Supreme Court, U.S.
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CASE NO. 941529

IN THE
UNITED STATES SUPREME COURT

MATTHEW C. HUDSON,

Petitioner,

v.

FIRST FIDELITY BANK, N.A., NEW JERSEY
(formerly known as First
National State Bank),

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals for The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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110 pp

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner was entitled to have the Court of Appeals for the Third Circuit review his claim that there was no underlying judgment because the "judgment" was not properly entered.

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OPINIONS BELOW

The United States District Court for the District of New Jersey entered summary judgment for respondent First Fidelity and against petitioner Hudson as to liability on June 18, 1991, referred to in the Appendix to this brief A - 3. The parties subsequently entered into a stipulation and order as to damages which, along with a "final judgment", was entered by the district court on May 19, 1992 and entered on the docket on May 22, 1992, contained at A - 18-19.

Hudson filed a motion under Federal Rule of Appellate Procedure 4(a)(5) to enlarge the time to appear or, alternatively, to enter a final judgment in accordance with the Federal Rules of Civil Procedure. The district court denied the motion by opinion and order dated October 21, 1992, contained at A - 20-38. Hudson filed a motion to

reconsider which the district court denied by opinion and order dated March 17, 1993 contained at A - 39-48.

On October 27, 1994, the United States court of Appeal for the Third Circuit entered a unreported opinion which affirmed the trial court's denial of Hudson's motion under Federal Rule of Appellate Procedure 4(a)(5) for extension of time for appeal and alternatively for his motion to enter judgment in accordance with the Federal Rules of Civil Procedure and is contained at A -1-17.

JURISDICTION

On October 27, 1994, the United States Court of Appeals for the Third Circuit issued an unreported opinion affirming the district court's October 21, 1992 order denying Hudson's motion under Federal Rule of Appellate Procedure 4(a)(b) for extension of time for appeal

and alternatively for entry of a judgment in accordance with the Federal Rules of Civil Procedure. On November 28, the Third Circuit denied defendant's motion for rehearing. A - 80-81. Jurisdiction of this Court to review the Third Circuits' order by want of certiorari arises under 28 U.S.C. §1254(1).

STATUTES INVOLVED

A Federal Rule of Civil Procedure involved is Rule 1 which provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action.

Another Federal Rule of Civil Procedure involved is Rule 54 which provides in part:

> (a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Yet another Federal Rule of Civil Procedure involved is Rule 58 which states:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment

> without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

The Local Federal Rule of the United District Court for the District of New Jersey involved is Rule 22 which

provides in part:

> B. In all cases contemplated by Rule 58(2) of the Civil Rules and when the Court makes any judgment as defined in Rule 54(a) of the Civil Rules, the prevailing party shall, within 5 days after determination, submit a judgment or order to the Court on notice to his or her adversary.

STATEMENT OF THE CASE

As the underlying facts of the dispute are irrelevant to the legal issue for which review is sought, petitioner has purposely kept its recitation of facts to a minimum.

Petitioner along with others, guaranteed a $15,000,000 construction loan, made by First Fidelity to Market Towers Associates ("MTA"), a subsidiary of American Property Group, Inc. ("APG"), in which petitioner was a major shareholder

and CEO. A - 82-83. Petitioner claimed that he was told by appellee that he was only guarantying the completion of the construction project, known as the Marina Club, while Esply-Tyas P.L.C., a London based company, was the guarantor for repayment of the loan. A - 57-58.

In 1986, the loan was restructured by First Fidelity, the prime debt was extinguished and petitioner, by the resident in the United Kingdom, along with Esply-Tyas, and APG, agreed to become guarantors, however Esply-Tyas never executed the documents. A - 55-57. The evidence was undisputed that respondents took the signature page from the document that petitioner signed and affixed it to a different document that petitioner had never seen, which inter alia removed Esply-Tyas as a guarantor. A- 55-57.

Despite what petitioner believed

to be numerous genuine issues of material fact, the trial court entered a summary judgment as to liability. A - 3. In order to assess damages, the court scheduled a hearing to determine the value of the building which respondent received when it foreclosed on its loan. In order to save judicial time and expense to the parties, petitioner and respondent stipulated to the value of the building with the express understanding that should the summary judgment be reversed the stipulations to the value of the property were null and void. A - 59; A - 61-62.

Counsel for respondent First Fidelity prepared the stipulation and the judgment. A - 62. After it was signed by all counsel, he forwarded it to the clerk, asked the clerk to have the trial court enter the judgment and that he, counsel for the plaintiff, rather than the clerk,

would notify Hudson's lawyers. A - 62. The order and judgment were entered on May 19, 1992, filed in the clerk's office on May 20, 1992, entered on the docket on May 22, 1992 (A - 18-19) and sent to respondent's counsel. A - 72-74.

Mr. Kizel, the attorney for respondent First Fidelity at the time, purported to send a copy of the executed judgment to Chicago counsel by cover letter addressed to Chicago counsel and copies to local counsel. A - 66-71. Petitioner's local New Jersey counsel received the judgment but petitioner's Chicago counsel received only the cover letter and did not receive the judgment. A - 63-65; A - 73. Upon inquiry initiated by Chicago counsel, petitioner and Chicago counsel learned of the judgment. A - 62. However, by that time 35 days had elapsed. Petitioner challenged in the district

court whether there was a final judgment and sought an extension of time to appeal pursuant to Rule 4(a)(5). A - 75-76. The district court found that the judgment was properly entered and denied the extension of time to appeal. A - 21-38.

Petitioner filed a timely notice of appeal from the district court's orders. A - 78-79. The Third Circuit affirmed the trial court in an unpublished opinion ruling (1) that the issue of whether there was a judgment was a matter of discretion; and (2) the court had not abused its discretion by failing to extend the time to appeal. A - 1-17.

As is set forth below, the issue of whether there is a judgment properly entered in this case is a matter of law which petitioner was entitled to have decided by the Court of Appeals. In this Petition, Hudson is not asking the Court

to review the denial of the extension of time which the Third Circuit itself characterized as appearing "harsh" because that was a matter of discretion. A - 17.

REASON FOR GRANTING WRIT

Petitioner respectfully submits that the Court should grant the writ of certiorari and vacate the judgment of the Third Circuit Court of Appeals and remand the case to that court to determine whether a final judgment was ever entered in this case to prevent a manifest injustice and to reconcile the conflict between the Third Circuit's decision and the Sixth and First Circuit Court of Appeals decisions in Jordan v. Gilligan, 500 F.2d 701, 704, 710 (6th Cir. 1974) and Honneus v. Donovan, 691 F.2d 1, 2 (1st Cir. 1982)

Further, petitioner respectfully submits that the error is so apparent that

the Court can dispose of this appeal with the order requested without extensive briefing and oral argument.

Finally, this Court's aid is needed so that petitioner, a Canadian lawyer who lives in Scotland and is being forced into bankruptcy there by respondent, can file an appeal on the merits of a $13 million summary judgment that was entered against him.

ARGUMENT

The first paragraph of the "final order" contains a recital of some of the pleadings. A - 18-19. Petitioner contends that the May 19 order was not a final judgment as it was not prepared or entered as required by the Federal Rules of Civil Procedure.

However, Rule 54(a) specifically states that "[a] judgment shall not contain a recital of pleadings, the report

of a master, or the record of prior proceedings." Because the May 19 order is not a "judgment" as that term is defined in Rule 54, it cannot be a judgment which is effective pursuant to Rule 58. In United States v. Indrelunas, 411 U.S. 216 (1973), the leading case under Rule 58, this Court held that Rule 58 must be "mechanically applied." 411 U.S. at 222. When, however, a notice of appeal has not been filed, such as here, then as set forth below, "Rule 58 should be applied, where reasonably possible, to protect the right to appeal." In re Seiscom Delta, Inc., 857 F.2d 279, 283 (5th Cir. 1988).[1]

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[1]See also, Allah v. Superior Court of State of California, 871 F.2d 887 (9th Cir. 1989), the court held a notice of appeal was timely even though it was filed 90 days after the order was entered because "[a]bsent compliance with these requirements, 'a party will not ordinarily be found to have exceeded any of the time periods set forth in Fed. R. App. P. 4(a).'" 871 F.2d at 890 (citing Vernon v. Heckler, 811 F.2d 1274, 1276 (9th Cir.

Rule 58 also provides that "the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment . . . ." Here, the final judgment was not prepared by the clerk, nor was it signed by him. The executed final judgment was prepared by First Fidelity's attorney.

Finally, the deputy clerk's failure to prepare and sign the "Final Judgment" in this case violates the mandate of Rule 58. In Carter v. Beverly Hills Sav. & Loan Ass'n., 884 F.2d 1186, 1189 (9th Cir. 1989), the court found that a file stamp stating "Entered March 26, 1985 Clerk, U.S. District Court Central District of California by SB deputy" was insufficient under Rule 58 because "Rule 58 contemplates a minute order prepared by

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1987) and Calhoun v. United States, 647 F.2d 6, 8 (9th Cir. 1981)).

a deputy clerk who then signs the minute order he prepares." 886 F.2d at 1189. Thus, the deputy clerk's failure to prepare and sign the "Final Judgment" in this case violates the mandate of Rule 58.

The standard of review of motions under Rule 60(b)(4) to vacate a judgment as void has been held to be plenary as "[a] void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside." Jordan v. Gilligan, 500 F.2d 701, 704, 710 (6th Cir. 1974) (denial of Rule 60(b)(4) motion to vacate order awarding attorney's fees against State of Ohio reversed as State is constitutionally immune from the award and the judgment was therefore void). See also Honneus v. Donovan, 691 F.2d 1, 2 (1st Cir. 1982) ("If [defendant's] motion is construed as having been made pursuant

to 60(b)(4), then the district court had no discretion because a judgment is either void or it is not").

All motions under Rule 60(b) are therefore not discretionary. Just as the determination of whether the judgment is void under Rule 60(b)(4) is not discretionary, the test of finality and whether a judgment is a judgment at all is similarly an objective one which is subject to this Court's de novo review.

In fact, petitioner's research has failed to reveal any cases where the court has held that the question of whether a judgment is final is a matter of discretion. Such a conclusion would run counter to the United States Supreme Court's analysis in United States v. Indrelunas, 411 U.S. 216 (1973), and its progeny which have set forth a bright line test as to whether a purported "judgment"

is indeed a judgment pursuant to the Federal Rules of Civil Procedure regardless of what it is called.

The Third Circuit did not review these issues. The Third Circuit refused to review these issues because it felt that the district Court's rejection of petitioner's claim was a matter of discretion. Specifically, the court held:

> We review the district court's denial of Hudson's motion to vacate final judgment pursuant to Fed.R.Civ.P. 60(b), and for reconsideration pursuant to Local Rule 12-I, for an abuse of discretion. See Harris v. Martin, 834 F.2d 361, 364 (3d Cir. 1987) (Rule 60(b)); Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333 (3d Cir. 1992) (motion for reconsideration). Because we find no merit with respect to Hudson's contentions in this regard, we conclude that the district court did not abuse its discretion, and will affirm the denial of these motions.

A - 8.

Even the cases cited by the

Third Circuit support the proposition that petitioner was entitled to have these issues addressed. In Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329 (3d Cir. 1985), the court held that if the motion is based upon a legal precept the review is plenary. And in fact, the court's review in that case was plenary. In another case cited by the Third Circuit, Harris v. Martin, 834 F.2d 361 (3rd Cir. 1981), the United States Parole Commission moved to vacate the judgment pursuant to Rule 60(b)(5) on the ground that a prior unrelated judgment had been reversed.

For these reasons, this matter should be remanded to the Third Circuit to determine whether a final judgment was entered.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests this Court to grant its Petition for Writ of Certiorari and then remand the case to the Third Circuit to review the claims raised by Petitioner as to the affirming of the underlying judgment.

Respectfully submitted,

MICHAEL J. ROVELL
(Counsel of Record)

Attorney for Petitioner

Dated: February 27, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5189

FIRST FIDELITY BANK, N.A., NEW JERSEY, (FORMERLY KNOWN AS FIRST NATIONAL STATE BANK)

Appellee,

vs.

MATTHEW C. HUDSON

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 88-05550)
District Judge: Honorable John F. Gerry

ARGUED OCTOBER 26, 1993

BEFORE: BECKER, ROTH AND LEWIS, Circuit Judges.

(Filed , 1994)

MEMORANDUM OPINION OF THE COURT

LEWIS, Circuit Judge.

In the case before us Defendant-Appellant Matthew Hudson waited more than

the thirty days allotted in Federal Rule of Appellate Procedure 4(a)(1) to file a notice of appeal. Hudson moved to enlarge the time to appeal, and in the alternative, to vacate the entry of judgment. The district court denied these motions along with Hudson's motion for reargument filed pursuant to Rule 12-I of the Local Rules for the United States District Court for the District of New Jersey. Hudson appeals these denials. We have concluded that the district court did not commit an abuse of discretion in denying these motions. As a result, we will affirm.

I.

Plaintiff-Appellee First Fidelity Bank ("First Fidelity") filed an action in the Superior Court of New Jersey in 1988, seeking to recover on a guaranty which Defendant-Appellant Matthew C.

Hudson has made. Hudson removed the case to the United States District Court for the District of New Jersey. Summary judgment as to liability was granted to First Fidelity, and the parties subsequently agreed to submit to the district court a stipulation and order fixing the amount of damages. Both parties understood that Hudson anticipated appealing the district court's judgment.[1] On May 18, 1992, First Fidelity's counsel sent a "Stipulation and Order" and a final judgment to the court for the Judge's signature. Judge Gerry signed both documents on May 22, 1992, the clerk entered the judgment. First Fidelity's

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1. The stipulation the parties agreed to enter provided that the valuation "is agreed on for purposes of obtaining a final judgment only, does not constitute an admission by either party, and will not bind either party in the event that the final judgment of this Court is reversed on appeal." (Appendix at 20.)

counsel claims to have forwarded copies of the stipulation and judgment, together with a cover letter that stated "Enclosed please find filed copies of the 'Final Judgment' and 'Stipulation and Order Regarding Renewed Motion for Summary Judgment' in connection with the referenced litigation," to Hudson's local counsel in New Jersey, as well as to lead counsel in Chicago.

Local counsel, Robert Nussbaum, admits having received a copy of the letter, the judgment and the stipulation on May 28, 1992. However, Mr. Nussbaum did not take any action on the letter. He claims he assumed Chicago counsel received the letter and enclosures, as the cover letter was addressed to the Chicago counsel with Nussbaum only receiving a copy. In addition, he believed that as

lead counsel, Chicago counsel would inform him if any appeal were to be taken.

Chicago counsel, Lisa Fair and Michael Rovell, contend that it was not until they called Mr. Nussbaum on June 26 and asked the status of the judgment that they learned that the judgment had been entered over thirty days previously. Chicago counsel first claimed to have not received the cover letter and enclosures from First Fidelity, but upon a search of their offices on June 30, 1992, Chicago counsel found a copy of the letter which they had in fact received on June 1, 1992. Counsel did not find copies of the judgment or the stipulation. According to Federal Rule of Appellate Procedure 4(a)(1), a party has thirty days in which to appeal a final judgment. Thus by the time Fair and Rovell discovered that the judgment had been entered, Hudson had

missed the deadline for filing his notice of appeal.

Negotiations between Hudson's Chicago counsel and First Fidelity's counsel over whether First Fidelity would agree to an enlargement of the time to appeal failed. Hudson then filed two motions: a motion to enlarge the time to appeal pursuant to Fed. R.App.P. 4(a)(5); and a motion to vacate judgment under Fed. R.Civ.P. 60(b)(4). Hudson filed his Rule 4(a)(5) motion on the ground that his counsel had failed to comply with Rule 4(a)(1) due to "excusable neglect." Hudson filed his motion to vacate final judgment on the grounds that the final judgment failed to comply with Fed.R.Civ.P. 54 and 58. On October 21, 1992, the district court denied Hudson's motions, finding no excusable neglect to excuse Hudson's failure to file his notice

of appeal timely, and no technical errors in the form of entry of judgment that would render it invalid. Hudson then filed a motion to reargue the denial of his motion to enlarge time on November 4, which was refiled in accordance to Local Rule 12-N, as per instructions by the clerk of the district court. The district court denied Hudson's motion to reargue on March 17, 1993, and this appeal followed.[2]

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2. First Fidelity argues that we do not have jurisdiction over this appeal. With respect to Hudson's appeal of the district court's denial of his motion to vacate, First Fidelity contends that by filing his notice of appeal from the district court's October 21, 1992 order on April 1, 1993, Hudson ran afoul of Rule 4(a)(1). With respect to Hudson's appeal of the district court's denial of his Rule 4(a)(5) motion, First Fidelity contends that Hudson failed to file his notice of appeal from the underlying final judgment within ten days from the entry of the district court's October 21 order, as required by Rule 4(a)(5). We have considered and do not find merit to First Fidelity's jurisdictional arguments.

II.

A.

We review the district court's denial of Hudson's motion to vacate final judgment pursuant to Fed.R.Civ.P. 60(b), and for reconsideration pursuant to Local Rule 12-I, for an abuse of discretion. See Harris v. Martin, 834 F.2d 361, 364 (3d Cir. 1987) (Rule 60(b)); Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333 (3d Cir. 1992) (motion for reconsideration). Because we find no merit with respect to Hudson's contentions in this regard, we conclude that the district court did not abuse its discretion, and will affirm the denial of these motions.

B.

The more significant question, however, which we now consider, is whether the district court abused its discretion

in denying Hudson's motion to enlarge the time for filing an appeal under Fed.R.App.P. 4(a)(5). While our review of the district court's interpretation and application of Rule 4(a)(5) is plenary, we review the district court's denial of the requested extension for abuse of discretion. Consolidated Freightways Corp. of Delaware v. Larson, 827 F.2d 916, 918 (3d Cir. 1987).

Federal Rules of Appellate Procedure 4(a)(5) provides:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). . . . No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting

> the motion, whichever occurs later.

Fed.R.App.P. 4(a)(5). The district court denied Hudson's motion to enlarge the time to appeal because it found he had failed to show excusable neglect.[3]

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3. Because seven of our sister circuit courts of appeals have construed Rule 4(a)(5) as permitting a "good cause" analysis only where the movant has brought the Rule 4(a)(5) motion prior to the expiration of the time allotted in Rule 4(a)(1) for the filing of a notice of appeal, and one has construed Rule 4(a)(5) as calling for excusable neglect and good cause analysis even where the 4(a)(5) motion is brought after the expiration of the 30-day period for taking the appeal, see Scarpa v. Murphy, 782 F.2d 300, 301 (1st Cir. 1986), we requested that the parties submit supplemental briefing on the question whether the district court should have considered whether Hudson had "good cause" for his failure to comply with Rule 4(a)(1). Upon review of the materials the parties submitted, we conclude that had the district court considered whether Hudson had good cause for his failure to comply with Rule 4(a)(1)'s 30-day time limit, the same denial of Hudson's Rule 4(a)(5) motion would have resulted. See Pontarelli v. Stone, 930 F.2d 104, 109-111 (1st Cir. 1991).

In Consolidated Freightways, we interpreted "Rule 4(a)(5) to require a finding of excusable neglect in those instances where the court, after weighing the relevant considerations is satisfied that counsel has exhibited substantial diligence, professional competence and has acted in good faith to conform his or her conduct in accordance with the rule." Consolidated Freightways, 827 F.2d at 920. We articulated five factors to be weighed in making this determination:

> (1) whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure; (2) whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court; (3) whether the tardiness results from counsel's failure to provide for a readily foreseeable

> consequence; (4) whether the inadvertence reflects a complete lack of diligence; or (5) whether the court is satisfied that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.

Consolidated Freightways, 827 F.2d at 919 (citations omitted).

The district court found that Chicago counsels' claims of never having seen the cover letter, which was later discovered in their offices, and of not having received the copies of the judgment and stipulation, constituted "excuses incapable of verification by the court." (Appendix at 111) (quoting Consolidated Freightways, 827 F.2d at 919). Next, the court found that "particularly given the fact that Chicago counsel was aware of the precise date on which the proposed judgment was submitted to the court, it

must be said that his failure to take any affirmative steps within 30 days of that date to check whether it had been signed and entered constituted a 'failure to provide for a readily foreseeable consequence' and a failure to make 'substantial good faith efforts toward compliance,' as well as a lack of due diligence." (Appendix at 111) (quoting Consolidated Freightways, 827 F.2d at 919). In finding that Hudson's counsel had the affirmative duty to check with the court and confirm whether or not the judgment had been entered, the district court relied on our decision in Hall v. Community Mental Health Center of Beaver County, 777 F.2d 42, 46 (3d Cir. 1985), in which we held that attorneys have a duty to monitor proceedings. The district court also noted that Federal Rule of Civil Procedure 77(d), which makes clear

that "notification by the clerk of the entry of judgment has nothing to do with the starting of the time for appeal," supports this view. See Notes of Advisory Committee on Rules (1946 Amendment). Finally, the court distinguished this case from Consolidate Freightways, where the attorney sent the notice of appeal within the time period allotted but inadvertently addressed it to the wrong court. Here, counsel let the judgment entry date and the fifty or so days thereafter slip by without doing anything.

Our own application of the Consolidated Freightways factors leads us to the same conclusion the district court reached: Hudson failed to demonstrate "excusable neglect." With respect to the first factor, whether counsel's inadvertence reflects professional incompetence such as ignorance of the

rules of procedure, we decline, as did the district court, to apply such a harsh label to the conduct of Hudson's Chicago counsel. We also agree with the district court's assessment of Consolidated Freightways factor four in relation to Hudson's Chicago counsel; while counsel arguably may have displayed a lack of diligence, to call lead counsel's conduct "complete[ly] lack[ing in] diligence" is, in our estimation, an overly harsh characterization. As for Hudson's local counsel, however, we believe that it may fairly be said that it did exhibit a lack of diligence in light of Local Rules 4 and 8, in having allowed the appeal deadline to pass without making certain that the appeal notice was filed.[4]

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4. Under these local rules, only local counsel is authorized to file papers with the court, and such papers must be signed by local counsel.

As for the other three Consolidated Freightways factors, we conclude that each weighs against a finding of excusable neglect.

Chicago counsel's explanation for its failure to comply with Rule 4(a)(1) is, as the district court noted, "incapable of verification by the court." Moreover, counsel's tardiness apparently resulted from its failure "to provide for a readily foreseeable consequence," and to make "substantial good faith efforts toward compliance." In sum, we conclude that given that Hudson's Chicago counsel knew the date on which the proposed judgment had been submitted to the court, its failure to take any action within thirty days of that date to check whether the judgment had been signed and entered is an "inadvertence . . . result[ing] from counsel's lack of diligence," Consolidated

Freightways, 827 F.2 at 919, rather than "inadvertence occur[ing] despite counsel's affirmative effort to comply" with Rule 4(a)(1)'s 30-day deadline. Id.

III.

In conclusion, we realize that the result we reach may be viewed as a harsh one and may seem unfair, given that Mr. Hudson may be forced to suffer whatever consequences will flow from the inadvertence of his counsel. We are, however, constrained by our case law and narrow scope of review. In our view the district court's conclusion is well-reasoned and did not constitute an abuse of discretion. Therefore, we will affirm.

TO THE CLERK:

Please file the foregoing opinion.

_____
Circuit Judge

By:_____
Paul Kizel
(PK 4176)
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BAUMGARTEN, FISCH & DAIME
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Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN, NEW JERSEY

FIRST FIDELITY BANK, N.A., NEW JERSEY (formerly known as First National State Bank),	:
Plaintiff,	:
-vs-	:
MATTHEW C. HUDSON,	:
Defendant.	:

CIVIL ACTION NO. 88-5550
CIVIL ACTION

FINAL JUDGMENT

Plaintiff, First Fidelity Bank, N.A., New Jersey, having filed a motion for summary jdugment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having filed opinions dated October 3, 1990, February 1, 1991, and

February 1, 1991, and June 18, 1991, and the parties having entered into a stipulation dated May _____, 1992;

IR IS ON THIS 19th day of May, 1992;

ORDERED AND ADJUDGED, that the Plaintiff, First Fidelity Bank, N.A., New Jersey, be granted summary judgment against Defendant, Matthew C. Hudson, in the sum of $13,763,795.05 with interest thereon from this date at the rate of 4.40% as provided by law.

_____

HONORABLE JOHN F. GERRY
CHIEF JUDGE, UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF NEW JERSEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FIRST FIDELITY BANK, N.A., NEW JERSEY (formerly known as First National State Bank),	:
Plaintiff,	:
-vs-	:
MATTHEW C. HUDSON,	:
Defendant.	:

Civil NO. 88-5550
OPINION

APPPEARANCES:

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GERRY, Chief Judge

Final judgment in this case was entered against defendant, Matthew Hudson,

on May 22, 1992. After the 30 days in which to file a notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure had expired, defendant filed this motion to enlarge the time to appeal on the grounds that his counsel had not know of the entry of final judgment by the court until after the appeal deadline. In the alternative, defendant moves to vacate the entry of judgment on the grounds that if failed to comply with the requirements of Fed.R.Civ.P. 54 and 58. Plaintiff opposes both motions. For the reasons set forth below, defendant's motions will be denied.

I. Facts

The following facts are gleaned from affidavits submitted by both parties. Summary judgment as to liability was granted to plaintiff, and the parties subsequently agreed to submit to the court a stipulation and order fixing the amount

of damages. Both parties understood that defendant anticipated appealing this judgment. On May 18, 1992, plaintiff's counsel submitted a proposed "Stipulation and Order" and "Final Judgment" to the court as had been agreed upon by the parties. The cover letter to the court and copies of the proposed judgment and stipulation were simultaneously forwarded both to defendant's local counsel and to defendant's outside counsel in Chicago, who were admitted pro hac vice and were acting as lead counsel on the case.

The judgment and the stipulation were signed by the judge on May 19, 1992, and the judgment was formally entered on the docket by the clerk on May 22, 1992. On May 26, 1992, plaintiff's counsel received executed and filed copies of the stipulation and the judgment from the court. On May 27, 1992, plaintiff's counsel assert that they sent a cover

letter and copies of the stipulation and the judgment via regular mail to both defendant's local counsel and to the Chicago law firm representing defendant. Defendant's local counsel, Robert Nussbaum, admits having received the cover letter with copies of the filed judgment and stipulation on May 28, 1992. Because the cover letter was addressed directly to the Chicago law firm with a copy sent to Mr. Nussbaum, he assumed that his co-counsel in Chicago had received the letter and enclosures and therefore took no action to notify them as to the entry of judgment.

Defendant's chicago counsel, Lisa Fair and Michael Rovell, assert that they were unaware that judgment had been entered until June 26, 1992. On that day, having not heard anything in slightly over 30 days, they called opposing counsel to ask if judgment had been entered yet.

That is when they found out it had been entered over 30 days previously. On the following Monday, June 29, 1992, Lisa Fair called plaintiff's counsel again to ask whether they would agree to an enlargement of the time to appeal. It appears that negotiations as to this issue legitimately extended until July 9, 1992, when plaintiff indicated that it would not agree to an enlargement of time. Five days later, defendant filed this motion.

Lisa Fair admits that after learning of the entry of judgment from the telephone call of June 26, 1992, she searched her office and eventually found the cover letter of May 27th that plaintiff's counsel had sent with the filed judgment and stipulation. The cover letter was apparently received on June 1, 1992, but Ms. Fair states that it appears to have been received without any enclosures. She asserts that her "best

recollection" is that she never saw the cover letter at all, and that even if she had seen it, the text of it would have indicated t her that plaintiff's counsel "was simply transmitting copies of what had been stamped 'Filed' by the Clerk to indicate that they had been received by the court from [plaintiff's counsel]." The cover letter reads as follows:

> Enclosed please find filed copies of the "Final Judgment" and "Stipulation and Order Regarding Renewed Motion for Summary Judgment" in connection with the referenced litigation.

II. Discussion

A. Enlargement of Time to Appeal for "Excusable Neglect"

Federal Rule of Appellate Procedure 4(a)(1) permits an extension of time to file a Notice of Appeal after the expiration of thirty days in cases where the would-be appellant can demonstrate

"excusable neglect." Both parties agree that the controlling case interpreting "excusable neglect" is Consolidated Freightways Corp. v. Larson, 827 F.2d 916 (3d Cir. 1987), cert. denied 484 U.S. 1032 (1988). In that case the Third Circuit identified the following factors to be considered in determining whether "excusable neglect" has been shown":

> 1) whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure;
> 2) whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court;
> 3) whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence;
> 4) whether the inadvertence reflects a complete lack of diligence;
> 5) whether the court is satisfied

> that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.

Id. at 919 (citations omitted).

In Consolidated Freightways the Third Circuit declined to adopt a per se rule that would hold that the inadvertence of counsel can never constitute excusable neglect. Rather, where the notice of appeal was received by the court three days later because the would-be appellant had inadvertently addressed to the notice of appeal to the wrong court, the Third Circuit held that excusable neglect had been shown. The facts presented here are clearly distinguishable. As the Third Circuit observed, "[t]here is a qualitative distinction between inadvertence which occurs despite counsel's affirmative efforts to comply and inadvertence which results from counsel's lack of diligence." While in

Consolidated Freightways, counsel took the affirmative step of sending the notice of appeal in a timely fashion, but inadvertently erred in addressing the envelope, here, defendant's Chicago counsel failed to take any affirmative steps to inquire as to whether judgment had been entered until after it was too late, despite the fact that they were aware of the exact date on which the proposed judgment had been submitted for the judge's signature.

Moreover, the fact that the cover letter clearly indicating that the judgment had been entered was received by the Chicago law firm renders defendant's position even more dubious. While we do not intend to impugn the veracity of defense Lisa Fair's assertion that she never saw the letter that was later recovered in the law firm's office, we must observe that this constitutes an

"excuse incapable of verification by the court."[1] Additionally, it can be argued that the conduct of Chicago counsel in this case "reflects professional incompetence," the "failure to provide for a readily foreseeable consequence," and "a complete lack of diligence." Indeed, the Third Circuit has held that lawyers have an affirmative duty to periodically check with the court to find out when judgment had been entered.[2] Hall v. Community

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[1]We find her hypothetical assertion that if she had seen the letter she would have interpreted it to mean something other than that the judgment had been filed by the court, to be entirely incredible.

[2]Indeed, the language of Fed.R.Civ.P. 77(d) supports this view:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice . . .upon each party . . . . Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court

Mental Health Center, 772 F.2d 42 (3d Cir. 1985).

In the face of these arguments, defendant has directed our attention to a case from the Middle District of Pennsylvania in which the court found excusable neglect based on facts quite similar to those presented here. In Haib Cranes & Loaders v. U.S. Truck Cranes, 125 F.R.D. 107 (M.D.Pa. 1989), appellant's counsel was not personally aware that judgment had been entered until over two weeks after the deadline for filing an appeal had passed because, although the filed judgment had been received in his office, it had been placed in a stack of correspondence in the secretary's office

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to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

without being presented to the attorney. The court held that, although this was a close case, excusable neglect had been shown. The court counted in appellant's favor the facts that counsel had acted promptly upon learning of the error, and that opposing counsel had been aware of the appellant's intention to appeal, both of which circumstances are also present here.

One important aspect of this case, however, distinguishes it from Haib and compels us to reach a different result. Here, the would-be appellant had local counsel who clearly knew of the entry of judgment. It is perhaps understandable that local upon receiving a copy of the judgment with a cover letter addressed directly to Chicago counsel, did not immediately contact his Chicago co-counsel, but rather assumed that it had been received by them. To then allow the

appeal deadline to pass, however, without ensuring that the appeal notice was filed, in our view reflects "a complete lack of diligence" on his part. Under Local Rules 4 and 8, only local counsel is authorized to file papers with the court, and such papers must be signed by local counsel" in this case, it was specifically the responsibility of local counsel to file the notice of appeal. Indeed, according to the Local Rules, Chicago counsel could not file it.

Therefore, even if we were to entertain some doubt as to whether the conduct of the Chicago counsel might rise to the level of excusable neglect in this case, when we consider in addition the independent and inadequate conduct displayed by local counsel, it is clear that the excusable neglect threshold has not been met. Accordingly, defendant's motion to enlarge the time for filing an

appeal will be denied.

B. Failure of Judgment to Conform to Rule 54 and 58

Rules 54 and 58 all relate to the definition, form and entry on the docket of final judgments. Defendant argues that because various technical requirements of these Rules were not adhered to, the Judgment entered on May 22, 1992 was not technically a final judgment and therefore did not trigger the running of the time for appeal. Defendant cites United States v. Indrelunas, 411 U.S. 216 (1973) for the proposition that Rule 58 must be "mechanically applied" in order to avoid any uncertainties as to the time for appeal.

The technical errors that defendant points to are first, that the judgment contains a "recital of some of the pleadings," in violation of Rule 54(a) which requires that "[a] judgment shall not contain a recital of pleadings, the

report of a master, or the record of prior proceedings." Defendant, however, provides no citation in support of the proposition that this provision of Rule 54 must be "mechanically applied" in the same manner as Rule 58. Indeed, according to Wright and Miller, Rule 54(a) is not to be strictly applied. They write, [a]lthough a judgment that contains extraneous matter is contrary to the spirit of Rule 54(a), if it otherwise is proper, it should be given effect." 10 C.Wright, A.Miller & M. Kane, Federal Practice and Procedure, § 2652 at 18. Moreover, it is not at all clear that the short "recital" contained in this judgment is violative of rule.[3]

Secondly, defendant asserts that

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[3]It states, "Plaintiff . . . having filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having filed opinions dated October 3, 1990, February 1, 1991, and June 18, 1991, and the parties having entered into a Stipulation . . ."

Rule 58's requirement that "the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment" and that "[a]ttorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course" has been violated. The final judgment was prepared by plaintiff's attorney rather than the clerk. The preparation of final judgments by attorneys, is, in fact, expressly authorized under Local Rule 22B, but defendant argues that this Local Rule violates the federal rule.

Even assuming that defendants argument is correct, and that this judgment did therefore violate Rule 58, a violation of this aspect of Rule 58 would not warrant the kind of extreme remedy that the Supreme Court imposed in Indrelunas, holding the judgment entirely

invalid. Indrelunas involved a violation of the separate document rule and held specifically that this aspect of Rule 58 -- not the entire Rule -- must be "mechanically applied." The Court based its reasoning on the purpose behind the separate document rule, which was to ensure greater certainty about when final judgment has been entered, and this to reliably put litigants on notice as to when the appeal period begins to run. The purpose behind Rule 58's requirement that judgments be drafted by the court, in contrast, has nothing to do with ensuring certainty as to when judgment has been entered. Rather, its purpose is to avoid delays in the entry of judgment. See 11 C.Wright, A.Miller & M. Kane, Federal Practice and Procedure § 2786. Thus, a violation of this aspect of Rule 58 does not implicate the adequacy of notice to the litigants, and we therefore do not

find the Indrelunas holding appropriate or controlling here. Indeed, defendant has not cited any cases in which Indrelunas has been applied to this aspect of Rule 58.

Finally, defendant argues that the judgment was not signed by the clerk. In fact, the judgment has been stamped "Entered" and that stamp has been signed by the clerk, as is the usual practice in this court. We do not find that practice to be violative of Rule 58.

Thus, because we do not find any technical errors in the form or entry of the judgment that would render it invalid, defendant's motion to vacate the entry of the judgment will be denied.

III. Conclusion

Accordingly, for the reasons set forth above, both of defendants motions are denied. The accompanying order has been entered.

JOHN F. GERRY, CHIEF JUDGE

DATED: October 21, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FIRST FIDELITY BANK, N.A., NEW JERSEY (formerly known as First National State Bank),	:
Plaintiff,	:
-vs-	:
MATTHEW C. HUDSON,	:
Defendant.	:

Civil NO. 88-5550
MEMORANDUM OPINION AND ORDER

APPPEARANCES:

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GERRY, Chief Judge

Following the entry of a $13.7 million judgment against him, Matthew

Hudson's attorneys missed the deadline for fling an appeal. This court denied Mr. Hudson's motion to extend that time for filing an appeal, and he now moves for reconsideration of that decision pursuant to Local Rule 12I. For the reasons set forth below, on reconsideration this court again declines to grant Mr. Hudson's motion for an extension of time.

The facts relevant to this motion have already been set forth in our opinion of October 21, 1992, and we will not repeat them here.

On reargument defendant focuses on our findings with respect to the conduct of local counsel, arguing that their conduct constituted "excusable neglect," and that an extension of time file an appeal is therefore warranted. Defendant apparently misapprehends the reasons of our original opinion. Our conclusion there did not turn on our

assessment of the actions of counsel in and of itself to fall short of the excusable neglect standard, even assuming no inadequacy on the part of local counsel. Accordingly, even if we were to reverse our finding with respect to the conduct of local counsel, as defendant urges, our ultimate decision on the merits of the motion would not change.

A determination under the "excusable neglect" standard is made by considering the conduct of counsel in light of five factors set forth by the Third Circuit in Consolidated Freightways Corp. v. Larson, 827 F.2d 916 (3d Cir. 1987), cert. denied, 484 U.S. 1032 (1988). Those factors are:

> 1) whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure;
> 2) whether the asserted inadvertence reflects an easily manufactured excuse

> incapable of verification by the court;
> 3) whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence;
> 4) whether the inadvertence reflects a complete lack of diligence;
> 5) whether the court is satisfied that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.

Id. at 919 (citations omitted). As we held in our original opinion and will reiterate here, an examination of the facts of this case in light of these facts clearly shows that the conduct of Chicago counsel did not rise to the level of "excusable neglect."

Chicago counsel's assertion that they never saw the cover letter that was later recovered in their offices and that they never received the judgment and

stipulation are clearly excuses "incapable of verification by the court." Moreover, particularly given the fact that Chicago counsel was aware of the precise date on which the proposed judgment was submitted to the court, it must be said that his failure to take any affirmative steps within 30 days of that date to check whether it had been signed and entered constituted a "failure to provide for a readily foreseeable consequence: and a failure a make "substantial good faith efforts toward compliance," as well as a lack of diligence. Indeed, as we pointed out in our previous opinion, the Third Circuit has held the court to find out when judgment has been entered, even in situations where they have no way of estimating when that may be. See Hall V. Community Mental Health Center, 722 F.2d

42 (3d Cir. 1985).[1]

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[1]In Haib Cranes & Loaders v. U.S. Truck Cranes, 125 F.R.D. 107 (M.D.Pa. 1989), based on facts very similar to those presented here, the district court found that the third and fifth Consolidated Freightways factors favored the moving party. We do not find that court's analysis convincing, however. The Haib court reasoned that "counsel could not have foreseen that a secretary would prevent an attorney from seeing the documents by intercepting them when they came into the office." Id at 110. In our view, however, the question posed by Consolidated Freightways is not whether it was foreseeable that the particular event which resulted in the lack of notice would occur, but whether it was foreseeable that anything might happen to prevent counsel from receiving notice that judgment had been entered. When the question is framed broadly in this way, and viewed in light of the Third Circuit's holding in Hall Mercer, we think it is difficult to avid the conclusion that, where counsel knew that the entry of judgment would be imminent, their failure to check with the court, was a "failure to provide for a readily foreseeable consequence."

Similarly, we find somewhat too glib the Haib court's conclusion that counsel in that case "exerted substantial good faith efforts toward compliance, [because he] fil[ed] promptly for an extension of time upon discovering that the judgment had been entered." While the speed with which counsel moves to cure the delay after the mistake has been discovered is approximately considered under this fact, see Consolidated Freightways, 827 F.2d at 920, counsel's

We are hesitant to apply the harsh label of "professional incompetence" to the conduct of Chicago counsel since we are convinced that his failure to take action sooner arose from inadvertence rather than an "ignorance of the rules of procedure." Additionally, while we find that they clearly displayed a lack of diligence, to call it a "complete lack of diligence" may be an overly harsh characterization. Nonetheless, despite such hesitations as to the first and fourth Consolidated Freightways factors, we cannot escape the fact that the other three facts clearly weigh against defendant. Thus, considering all five

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good faith efforts before the expiration of here, as in Haib defense counsel moved reasonably quickly to obtain an enlargement of time after discovering the error, their failure to check with the court before the appeal deadline demonstrated a definite lack of "substantial good faith effort." On balance, therefore, we find that this facto also weighs against defendant.

facts together, we have no choice but to reach the conclusion that "excusable neglect" on the part of Chicago counsel has not been shown.

Where two attorneys have responsibility for an appeal, an extension cannot be granted unless both could show excusable neglect. See Prestex, Inc. v. United States, 4 Cl.Ct. 317 (1984), Aff'd mem., 746 F2d 1489 (Fed.Circ. 1984). Accordingly, given our finding that Chicago counsels' conduct fails to meet the excusable neglect threshold, we are compelled to deny the motion for an extension of time, regardless of our findings with respect to local counsel.[2]

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[2]J.P. Fyfe, Inc. of Florida v. Bradco Supply Corp., 96 B.R. 479 (D.N.J. 1989), cited by defendant, does not compel a different result. F.P. Fyfe merely held that where more than one lawyer is involved, but one attorney "has acquired the sole responsibility for filing a notice of appeal, only he may fairly be required to satisfy the [excusable neglect] test." Id, at 483. Here, Chicago counsel and local counsel had

Thus, we need not address defendant's arguments with respect to the conduct of local counsel.

Therefore, this matter having come before the court on defendant's motion for reconsideration of this court's order denying defendant's motion for an enlargement of the time to file an appeal, and the court having considered the submissions of the parties and having reconsidered its earlier decision;

It is, this 17th day of March, 1993, hereby ORDERED that this court's order denying defendant's motion for an enlargement of time is AFFIRMED.

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joint responsibility for filing the appeal. While the actual physical acts of signing and filing the appeal notice had to be performed by local counsel under Local Rules 4 and 8, before that could be done, authorization had to be given by Chicago counsel, who was lead counsel and had exclusive contact with the client. Thus, a finding of excusable neglect by both Chicago and local counsel would be necessary tow arrant an extension in this case.

JOHN F. GERRY, CHIEF JUDGE

Mr. Edward L. Heil
Executive Vice President
First Fidelity Bank
570 Broad Street
Newark
New Jersey
07192

September 22, 1987

Dear Ed,

I have made six or seven phone calls to you over the last few weeks, each time prearranging with your secretary a time or a day and time when I could expect to get through to you. At each and every call I was told that you had someone with you and could not take the call, with one exception when I was told you had not yet returned from the loan committee meeting. I don't know why you have not wanted to take my call although it adds to my disappointment in how the Bank has conducted itself in this matter. Notwithstanding my personal feelings I believe it would be best for all if we put this matter behind us. I would urge you to accept the Beni proposal which will save us all further costs and litigation. My lawyer has met on at least two occasions with David Bruck to attempt to facilitate the Beni proposal and has offered whatever assistance we can render in aiding the Bank with Beni, perhaps in enhancement of their offer. Similarly we

have contacted your new lawyer to suggest a meeting.

Over the last several months I have become aware of unfounded, even ludicrous, allegations that I abandoned APG and Marina Club when relocating to the UK at the beginning of 1986. This relocation was done to facilitate the raising of the equity for the Casino project pursuant to an undertaking given to me by certain members of the U.K. consortium. Recently (June 1987) the consortium took U.K. legal advice and settled their potential liability to me by assigning to me all of their common shares, preference shares and debt in APG for 6 pounds. Their investment in these assets was approximately $20 million. All of the consortium assets as well as all my common stock, preference stock and debt have been offered by me to Beni for nothing to induce Ragan Henry to make an acceptable deal with the Bank for Marina Club.

As between myself and the Bank Ed, I think you should know that since the formation of APG I have never taken a loan, distribution or dividend of any kind from the company. I never drew the full amount of the salary to which I was entitled by contract and after the last spring of 1985 I drew no salary of any kind whatsoever. Throughout the period of time from the formation of the company in 1983 through the summer of 1986 my average APG work week was in excess of 60 hours. For the last year for obvious reasons this has declined to some 20 -30 hours per week. Since the formation of the company I have converted more than $4.8 million of cash and debt owing to me into equity in APG. Much of this was done at the

insistence of the UK consortium and on average the common stock acquired by me subsequent to the consortiums involvement was acquired at prices roughly double what the consortium paid in each case for their equity. In addition to the conversion of cash and debt into stock, subsequent to January 1, 1986 I have forgiven another $500,000 of debt so that the company could meet certain SEC requirements and therefore maintain its' NASDAQ listing.

Since coming to the UK to work on the Casino financing (which of course included refinancing Marina Club as it was to become a satellite hotel operation) I have personally expended several hundred thousand dollars and untold hours attempting to refinance and remarket Marina Club. In certain instances that effort has been thwarted by actions of the Banks' agents. I believe that it may be valuable for you to be aware of some of the situations of which I refer.

1. Through the offices of Simmons and Simmons in London and Hong Kong, as well as Spector Cohen Gadon and Rose in Philadelphia, financing arrangements were put in place whereby a Netherlands Antilles company was formed to joint venture Marian Club with APG and to sell shares in the Far East. We had been assured through International Capital Management that the property would be sold out within twelve to eighteen months (just about now in fact). On November 18, 1986 Dr Geiger and Mr Jensen (representing International Capital Management) met with David Bruck of Greenbaum et al to discuss the ICM proposal. Unfortunately Mr Bruck's temporary secretary cancelled the meeting and a subsequent meeting prior to

Mr Jensen's leaving for the Orient could not be arranged.

Generally the Bank and its agents looked upon the International Capital Management plan and the foreign investment proposal as "pie in the sky". To the contrary, this plan would have not only refinanced American Property Group but generated the income necessary for the Banks to be made "whole" and for the company to realise a significant profit on the sale of the units. The second part of our agreement with ICM would have provided for Tannen Towers to be similarly refinanced and sold thus permitting APG to move forward with its Casino plans.

Today, Mr Jensen is in the process of successfully raising funds for another project in Atlantic City (through the Oriental market) but unfortunately, because the Bank was unwilling to wait the additional time necessary before taking action to litigate the loan, our agreement with ICM could not be pursued. I have asked Phil Geiger to send under separate cover a brochure which was created by APG (funded by myself) at the request of the Orientals so that the N.V. stock could be sold further enhancing our ability to pay the Bank either through the sale of the stock or through the sale of the individual condominium units.

I personally funded in excess of $70,000 for legal fees and expenses as well as months and months of effort in order to bring about this initiative. Surely the Bank will have been better off spending the twelve to eighteen months satisfying the loan balance rather than litigating as it now finds itself. The ICM agreement would not only have

satisfied the Banks' outstanding loan but the company would have earned a significant profit with the potential benefits of funding the Tannen Towers Casino. Clearly the biggest loser in this situation is myself since the Bank still has Marina Club and the vacant land complete with approvals for hundreds of residential units, as its collateral.

2. An agreement was reached with Penta Hotel Corporation of Ascot, England to finance the continued development of Marina Club. It was the intention of Penta Hotels Limited to place no less that $1 million into the project representing 10% of the equity needed to construct the balance of the development. Again, despite the fact that the Bank was informed of this prospect and the expectations that the announcement of Penta's participation would accelerate sales of Building One and give credibility to the project in general, the Bank through its agents did not permit the delay in its foreclosure action and the Penta agreement was later withdrawn by Mr Fred Dillman, President of Penta Limited. Penta as you know is owned by a consortium of international airlines including Lufthansa, British Airways etc. Most people recognise the fact that the singly high rise structure on the blighted Farmers Market site would have far greater credibility as a project if additional construction were ongoing on the adjacent property and renewed sales began at Marina Club One.

3. In the spring of 1986 the Bank "workout team" met with Dr Geiger and members of his staff to detèrmine what could be done with Marina Club property. Jack Cussen and Timothy Mundrick both

expressed a willingness to create a "workout plan" and felt that it might take as much as three years to resolve the Marina Club problem. Dr Geiger along with our staff made a presentation to Mr Mundrick at the Banks' request in terms of renewed efforts to market the property. Mr Mundrick responded quite favorably to this presentation and indicated he would "run it past" Mr Culver and members of the Bank's staff. Despite the appearance that the Bank intended to create a "workout plan" with the developers that was viable, Mr. Culver the account executive soon indicated that Messrs Cussen and Mundrick would have no further responsibility for the Marina Club project and therefore the "workout plan" was "over". There was no further effort expended by the Bank to try to reach an amicable resolution to this situation despite the fact that the initial $30,000 request and the $10,000 per month for closings would undoubtedly have created a situation in which the property could have been properly advertised and marketed.

4. To enhance the value and revenue of Marina Club One, we commenced construction of meeting room and banquet facilities on the ground floor. Sharswood Builders Inc worked with us in certain fit up work so we could attract small groups to Marina Club. At a point in time the work remaining to complete these renovations was $50,000. The Bank was however unwilling to advance $22,000 of the sum necessary and expressed absolutely no interest in pursuing this avenue to enhance the value of the project and/or generate additional income.

5. Perhaps one of the most detrimental actions that has occurred to

date were the comments made to Mr Richard Rosenberger of Visions Mortgage Company by Mr. Culver. Specifically we were informed by Mr Rosenberger that Mr Culver asked him to warehouse sixteen loans valued in excess of $2 million while the mortgage broker, Visions Mortgage Company, received the final end-loan commitment. We were advised by Mr Rosenberger that Mr Culver indicated that Marina Club project was "a loser". In addition Mr Culver indicated that the sale to Charles Evans of Evans and Hughes was not a valid sale, and therefore the presale conditions of Visions Mortgage Company would not have been met. Despite the attempts of the management to resolve this dispute Visions were never satisfied because the Bank refused to say anything further, clearly realising that they had made a serious mistake by making such detrimental remarks about their own project, when $2 million worth of loans would have been closed and would have helped satisfy the obligations to the Bank. This matter is of grave magnitude and has had significant impact on the deterioration of the relationship with the Bank and with prospective purchasers. Once the sixteen individual purchasers received notice that the loans were not approved because of certain concerns, they all cancelled their agreements to purchase

Ed as I am sure you realise, during our administration and management of Marina Club the facility was well maintained, well thought of by the business community as well as our client base, and every possible effort was made to improve the quality of the facility. Since the appointment of a trustee the building has been badly mismanaged which causes me grave concern and was one of the

reasons why I reached out to you recently. I don't know why the bank was instrumental in the appointment of the Trustee but I do know that we fought against it and that I personally expended some $50,000 in legal fees attempting to maintain control of the day to day operations of Marina Club. However I have begun to feel that my move to England which was intended to last for some six months while the financing for the Casino project was put in place, has caused the Bank to act with poor judgment as regards the Marina Club project. Perhaps you listened to the slanderous comments to which I referred earlier and believed I had abandoned APG. To the contrary our British investors asked me to make myself available in the UK on a full time basis during the raising of the equity portion of the funds necessary for the Casino project. As I have four little girls and was separated from my wife I had no option but to keep the girls with me and thus we all made a temporary move to the UK. I was still spending one week a month in New Jersey until the consortium disintegrated in the late Spring, early Summer of 1986. My suspicion is that the Banks' negative perception of my move and the breakdown of the Tannen Towers agreement caused an irrational and personal vendetta against Marina Club and myself, perhaps due to the earlier Tannen Towers failure and the corresponding reputational difficulties for some of the Bank personnel.

You should be aware that I was forced to sell my home in the United States when the consortium ceased to function in order to raise additional capital to further fund APG. It became clear at that time that the best chance for success for APG was to shed itself of

the Bayshore Property and concentrate all my efforts and those of Phil Geiger and the staff on saving Marina Club. I stayed in the UK in order to have access to the UK, European and Far Eastern markets while Phil was responsible for day to day operations and canvassing the USA. However despite the huge sums of personal money expended and the personal effort that was put forth by Phil, myself and our staff, the project as originally conceived simply did not make it. As you know we attempted every possible approach to sell Marina Club and to provide adequate funds to maintain the facility in the a first rate condition that we did. Eventually I ran out of money and there seemed no other avenue available except to put the company into a Chapter 11 thereby, we hoped, at least providing us with continued day to day control of the operation of Maria Club. This however was not allowed to happen and I fear that the affairs of Marina Club have recently been terribly mishandled.

Without being argumentative Ed I hope that I have alerted you to the fact that First Fidelity Bank both by its actions and inactions have detrimentally affected the project. As to my purported personal guarantee I should like to remind you that you personally assured me that the Bank would look to Espley Tyas should there ever be a need to call for financial contribution. You told me that you wanted me included as a coguarantor to insure that the building was successfully completed since I was the "local partner", I relied on your statement, the excess collateral given by the redevelopment agency and the financial strength of Espley Tyas when I originally signed the guarantee. Subsequently I gather that the

Bank decided unilaterally to release Espley Tyas from its obligations. Not only was this done without notice to myself but I was led to believe at the time I signed the continuing guarantee that Espley Tyas were also continuing as a guarantor. Subsequent to me signing the agreement, the Bank or its attorney modified the document to delete Espley Tyas as a party. Under the circumstances I believe that I have no personal liability under the purported guarantee.

However I want to do whatever I can to assist the Bank. I believe that a number of avenues of cooperation between myself and the Bank exist and to this end I would welcome some useful dialogue.

cc. P.E. Geiger by Facsimile
M.J. Rovell by Facsimile

FIRST FIDELITY BANK, et al.

MATTHEW C. HUDSON

88-5550

7/22/91	76	MINUTES OF 7-19-91 - See #77, Evidentiary Hearing cancelled, Stipulation to be filed with the Court, filed 7-19-91 (Gerry),
11/20/91	-	ALL FURTHER ENTRIES ARE ON ICMS SYSTEM

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LAW OFFICES OF MICHAEL J. ROVELL
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Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FIRST FIDELITY BANK, N.A., NEW JERSEY (formerly known as First National State Bank),	Civil Action No. 88-5550 (JFG)
-vs-	
MATTHEW C. HUDSON,	
Defendant.	

CERTIFICATION OF LISA I. FAIR

LISA I. FAIR certifies to the following facts:

1. I am an attorney in the law offices of Michael J. Rovell, principal attorneys foe defendant Matthew Hudson in the above-captioned action.

2. By order dated June 18,

1991, the Court granted First Fidelity Bank's motion for summary judgment finding Mr. Hudson liable on a guarantee of a Loan from First Fidelity to Market Towers Associates. The Court reserved ruling on the "issue whether First Fidelity is in possession of the property such that Hudson is entitled to a credit for the fair market value of the property" and scheduled an evidentiary hearing for July 3, 1991 on that issue.

3. Within the next week, the parties agreed to save the Court's time by entering into a stipulation of the facts that would have been presented at the hearing. The hearing was continued pending submission of the stipulation, which Paul Kizel, for First Fidelity, undertook to draft. Over the course of the next month, the parties investigated the facts. Mr. Kizel prepared a stipulation, and we requrested certain

changes. Mr. Kizel then indicated that First Fidelity would agree to stipulate that Mr. Hudson was entitled to an off-set and the value of the off-set. Accordingly, he agreed to obtain the two most recent appraisals on the building, the second of which I received in November. We then agreed to split the difference between the two appraisals for th epurpose of settling that issue only, and agreed that it would not be binding if Mr. Hudson prevailed on appeal.

4. Approximatleysix months later, on May 14, 1992, I received a form of "Final Judgment" and "Stipulation and Order Regarding Renewed Motion for Summary Judgment' which I caused to be signed on behalf of Mr. Hudson and returned to Mr. Kizel.

5. On May 21, 1992, I received a copy of Mr. Kizel's letter with enclosures transmitting the proposed

judgment and stipulation to the Court's clerk with a request that they be given to Judge Gerry for his review and execution. Mr. Kizel also requested that a filed stamped copy of each be returned to him in the envelope provided.

6. On June 26, 1992 Michael Rovell inquired concerning the status of the matter since we had not seen an executed copy of the order. I called Mr. Kizel while Mr. Rovell was on the telephone and asked if he knew whether the order had been entered. He informed us that it had and that he had telecopied the order to me on May 27, 1992.

7. At my request, he immediately telecopied his May 27 letter and the orders. I had never seen either before nor had anyone advised me that a Judgment had been entered.

8. On June 29, 1992, the next business day, we caused our offices to be

searched to see whether the letter and the order had been telecopied to us. We did not find a telecopy of either the letter or the judgment. I also note that in the past, matters that had been telecopied to us by Mr. Kizel bore the legend "VIa Fax:. This letter does not bear such a legend.

9. My associate, Robert Bull, contacted my secretary who has been out of town since June 19, 1992 helping her mother convalesce from cancer surgery and inquired whether she received by telecopy the letter and order. She advised that we did not.

10. We then discovered on June 29th that the May 27, 1992 letter only was received on June 1, 1992. No enclosures were included. It is my best recollection that I did not see it. Had I seen it, the text of the letter would have indicated to me that Mr. Kizel was simply transmitting copies of what had been stamped "Filed" by

the Clerk to indicate that they had been received by the Court from Mr. Kizel. Surely if I had seen a judgment executed by the COurt, I would have rembered and prepared and filed on a timely basis a Notice of Appeal.

Further, affiant sayeth not.

_____
Lisa I. Fair

Sworn to before me this
____ day of ____, 1992

_____
Notary Public

ARCHER & GREINER
A Professional Corporation
One Centennial Sqaure
Haddonfield, New Jersey 08033
(609) 795-2121
Attorneys for Plaintiff
First Fidelity Bank, N.A.

BY: DAVID B. BACON, ESQ. (DB 0028)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FIRST FIDELITY BANK, N.A., NEW JERSEY (formerly known as First National State Bank),	:
Plaintiff,	:
-vs-	:
MATTHEW C. HUDSON,	:
Defendant.	:

Civil Action No. 88-5550(JFG)
Date of Argument: September 4, 1992

CERTIFICATION OF PAUL KIZEL IN OPPOSITION TO DEFENDANT'S MOTION TO EXTEND TIME TO APPEAL

1. I am an attorney admitted to practice in the State of New Jersey. I am a member of the firm of Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, former counsel for Plaintiff, First Fidelity

Bank, N.A., New Jersey in this action. I have personal knowledge of the facts set forth herein.

2. Pursuant to Opinions and Orders filed by this Court on October 3, 1990, January 29, 1991, and June 18, 1991, Plaintiff's Motion for Summary Judgment was granted as to Defendant's liability under a written guaranty executed by Defendant in favor of Plaintiff. See Exhibits A, B and C.

3. The only outstanding issue remaining after the June 18, 1991 Opinion and Order was whether Defendant was entitled to a credit equal to the value of certain real estate which served as collateral for the debt obligation guaranteed by the Defendant and, if so, the amount of the credit. See Order attached as part of Exhibit C. The June 18, 1991 Order scheduled a hearing on July 3, 1991 to consider this issue. Id.

However, prior to July 3, 1991, I had conversations with Lisa Fair, an attorney with the Law Office of Michael Rovell, the Chicago-based co-counsel for the Defendant (the "Rovell Firm"), concerning the possibility of avoiding the need for a hearing by having the parties mutually agree that Defendant was entitled to a credit and upon the amount of the credit. Prior to the July 3, 1991 hearing date either I and/or Lisa Fair contacted the Court and advised that the parties were attempting to resolve the remaining issue without the need for a hearing. As a result the hearing was adjourned without date.

4. By letter dated March 25, 1992, after several conversations with Ms. Fair concerning the amount of the credit, I forwarded a proposed Stipulation and a proposed Final Judgment to Lisa Fair, with a copy to Robert Nussbaum, an associate

with Defendant's New Jersey counsel, Saiber, Schlesinger, Satz & Goldstein (the "Saiber Firm"). See Exhibit D. On April 1, 1992, after I discussed certain revisions with Ms. Fair, I forwarded revised forms of the documents to Ms. Fair. Id. On May 13, 1992, I forwarded an original and one copy of both the final versions of the Stipulation and Final Judgment to Ms. Fair for execution. Id.

5. On May 18, 1992, I sent a letter to the Court enclosing an original and one copy of the Stipulation and Final Judgment. Copies of the letter and enclosures were simultaneously forwarded to Lisa Fair by fax and regular mail and to Robert Nussbaum by regular mail. See Exhibit E.

6. On or about Tuesday, May 26, 1992, I received executed and conformed copies of the Stipulation and Final Judgment from the Clerk of the District

Court.

7. On May 27, 1992 I sent a letter via regular mail addressed to "Michael J. Rovell, Esq. 55 West Monroe Street, Suite 3300, Chicago, Illinois 60603, Attn: Lisa Fiar, Esq." enclosing copies of the Stipulation and Final Judgment. A copy of the letter and enclosures were also forwarded to Robert Nussbaum by regular mail. See Exhibit F.

8. I did not receive any communication from Lisa Fair, Michael Rovell, Robert Nussbaum or any other person from the Rovell Firm or Saiber Firm until the late afternoon of Friday, June 26, 1992 when I received a call from Lisa Fair who informed me that Michael Rovell was also on the line. They both asked whether I knew about the status of the entry of the Final Judgment. I told them that I received copies of the Stipulation and Final Judgment several weeks earlier

from the Clerk and sent those documents to both Ms. Fair and Mr. Nussbaum. At their request, on June 26, 1992, I instructed my secretary to again send a copy of the May 27, 1992 letter and Final Judgment to Mr. Rovell's Office.

I hereby certify that the foregoing statements are true. I am aware that if any of the statements are willfully false I am subject to punishment.

_____

PAUL KIZEL

DATED: August 5, 1992

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Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FIRST FIDELITY BANK, N.A., NEW JERSEY (formerly known as First National State Bank),	:Civil Action No. 88-5550 (JFG)
-vs-	
MATTHEW C. HUDSON,	
Defendant.	

CERTIFICATION OF ROBERT B. NUSSBAUM

ROBERT B. NUSSBAUM declare that:

1. I am an attorney-at-law of the State of New Jersey and am an associate with the firm of Saiber Schlesinger Satz & Goldstein, local counsel for the defendant, Matthew C. Hudson.

2. On or about May 28, 1992, I received a copy of a letter together with enclosures sent by plaintiff's counsel, Paul R. Kizel, Esq., of Ravin, Sarashon, Baumgarten, Fisch and Baime, the original of which was directed to Michael J. Rovell, Esq., to the attention of Lisa Fair, Esq. The enclosures consisted of a "Final Judgment" and "Stipulation and Order Regarding Renewed Motion for Summary Judgment". Since the original letter and enclosures were addressed directly to Mr. Rovell, attention of Ms. Fair, as had all past correspondence addressed to Mr. Rovell's office, we assumed that the letter and enclosures were received at the same time we received the copy of the letter and documents; there was no reason for me to confer further at that time about the judgment and stipulation.

3. I certify under penalty of perjury under the laws of the United

States of America that the foregoing is true and correct.

DATED: July 14, 1992.

_____

ROBERT B. NUSSBAUM

Proceedings include all events.
12BG PRETRL APPEAL
1:88cv5550
FIRST FIDELITY BANK, et al.
v. HUDSON, et al

12/28/88	1	NOTICE OF REMOVAL by MATTHEW from state court Atlantic County (dv) [Entry date 11/20/91]
7/10/90	50	FINAL PRETRIAL ORDER filed (signed by Magistrate Joel B. Rosen) (dv) [Entry date 11/20/91]
11/20/91	--	ALL ENTRIES PRIOR TO 11/20/91 ARE DOCKETED ON THE PAPER DOCKET SHEET. (dv)
5/20/92	77	JUDGMENT for FIRST FIDELITY BANK against MATTHEW C. HUDSON in the amount of $12,763,795.05 with post judgment interest as provided by law from entry date. (signed by Chief Judge John F. Gerry) (jo) [Entry date 05/22/92]
5/20/92	78	STIPULATION and ORDER permitting Mathew Hudson certain credit against the amount of the debt owed to plaintiff. (Gerry) N.M. (jo) [Etnry date 05/22/02]
5/22/92	--	Case closed (jo)
7/14/92	79	NOTICE OF MOTION for an order enlarging the time within which the defendant,

		may file a Notice of Appeal from a judgment entered on 5-22-92 by defendant MATTHEW C. HUDSON, Motion hearing set for 9:30 9/4/92 on [79-1- motion (Certificate of Service thereto) (Memo Submitted) "ORAL ARGUMENT REQUESTED" (lc) [Entry date 07/15/92]
7/14/92	80	CERTIFICATIN of Michael J. Rovell Re: [79-1] motion for an order enlarging the time within which the defendant, may file a Notice of Appeal from a judgment entered on 5-22-92. (lc) [entry date 07/15/92]
7/14/92	81	CERTIFICATION of Lisa I. Fair Re: [79-1] motion for an order enlarging the time within which the defendant, may file a Notice of Appeal from a judgment entered on 5-22-92. (lc) [entry date 07/15/92]
7/14/92	82	CERTIFICATION of Robert B. Nussbaum Re: [79-1] motion for an order enlarging the time withint which the defendant, may file a Notice of Appeal from a judgment entered on 5-22-92. (lc) [entry date 07/15/92]
8/6/92	86	SUBSTITION OF ATTORNEY ON BEHALF OF PLAINTIFF.Terminated attorney PUAL KIZEL for

		FIRST FIDELITY BANK ; Added, JOHN V. FIORELLA. (lc) [Entry date 09/10/92]
8/7/92	84	CERTIFICATION of Kathleen Pallitto RE: In opposition to defendant's motion to extend time to appeal. (lc) [Entry date 08/10/92]
8/7/92	84	CERTIFICATION of Paul Kizel RE: In opposition to defendant's motion to extend time to appeal. (lc) [Entry date 08/10/92]

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Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FIRST FIDELITY BANK, N.A., NEW JERSEY (formerly known as First National State Bank),	:
Plaintiff,	:
-vs-	:
MATTHEW C. HUDSON,	:
Defendant.	:

Civil NO. 88-5550
NOTICE OF APPEAL

Notice if hereby given that defendant Matthew C. Hudson ("Hudson") hereby appeals to the United States Court of Appeals for the Third Circuit from the March 17, 1993 Order denying Hudson's motion for reconsideration and the October

21, 1992 Order denying Hudson's motion to enlarge the time for filing an appeal or to vacate the entry of judgment.

SAIBER SCHLESINGER SATZ
& GOLDSTEIN
Attorneys for Defendant

By: _____
BRUCE I. GOLDSTEIN

Dated: March 31, 1993

CERTIFICATION OF SERVICE

I hereby certify that on this date I caused copies of the within Notice of Appeal to be served upon all counsel of record by delivering the same via Federal Express to the following:

David B. Bacon, Esq.
Archer & Greiner
One Centennial Square
Haddonfield, New Jersey 08033
Attorneys for Plaintiff

_____
BRUCE I. GOLDSTEIN

Dated: March 31, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5169

FIRST FIDELITY BANK, N.A., NEW JERSEY,
(FORMERLY KNOWN AS FIRST NATIONAL STATE
BANK)

Appellee,

vs.

MATTHEW C. HUDSON

Appellant.

SUR PETITION FOR REHEARING

PRESENT: BECKER, ROTH and LEWIS, Circuit Judges.

The petition for panel rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

BY THE COURT,

_____

Circuit Judge

Date: November 28, 1994

October 3, 1990

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875 North Dearborn
Chicago, Illinois 60610
Suite 3300
Chicago, Illinois 60603

Re: First Fidelity Bank, N.A., New Jersey v. Matthew Hudson
Civil Action No. 88-5550 (JFG)

Dear Counsel:

The plaintiff, First Fidelity Bank ("First Fidelity"), brought this action against the defendant, Matthew C. Hudson ("Hudson"), seeking to enforce a claim arising under a guaranty executed by

Hudson. In April 1983, First Fidelity issued a $15,000,000 construction loan to Market Towers Associates ("MTA"), a limited partnership, for the construction of a condominium project known as the Marina Club. Hudson, who is the primary shareholder, chief executive officer and, at that time, president executed an unconditional joint and several guaranty of the loan. A guaranty was also executed by Espley-Tyas, a London based company who is not a party to this action.

Subsequently, MTA sought to extend the maturity date of the loan. Counsel for First Fidelity drafted documents to modify the agreement so as to extend the maturity date from October 21, 1985 to April 21, 1986 and add APG as an additional guarantor. The documents included MTA, First Fidelity, Hudson and Espley-Tyas as parties to the agreement. However, Espley-Tyas, who was then involved in liquidation proceedings, never executed these modification documents. As a result, counsel for First Fidelity re-drafted the modification documents so as to eliminate Espley-Tyas as a party. The parties dispute whether or not these documents were ever validly executed by Hudson.

Supreme Court, U.S.
F I L E D
APR 12 1995
OFFICE OF THE CLERK

(2)

No. 94-1529

In The

Supreme Court of the United States

October Term, 1994

MATTHEW C. HUDSON,

Petitioner,

v.

FIRST FIDELITY BANK, N.A., NEW JERSEY
(formerly known as First National State Bank),

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT FIRST FIDELITY BANK'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Respondent First Fidelity Bank, N.A., New Jersey

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a Petition for a Writ of Certiorari should be granted requiring the United States Court of Appeals for the Third Circuit to reconsider Petitioner's argument that the form and entry of the Final Judgment of the United States District Court for the District of New Jersey (Gerry, C.J.), contravened Rules 54 and 58 of the Federal Rules of Civil Procedure and, therefore, is void, where: (1) the Petition fails to satisfy the prerequisite standards of Rule 10 of the United States Supreme Court; (2) Petitioner was provided with a plenary appellate review on the issue and was unsuccessful; (3) Petitioner's counsel consented to the form and entry of the Final Judgment that they presently challenge following the grant of Summary Judgment in favor of Respondent; (4) the Final Judgment otherwise complies in all respects with the word and spirit of Rules 54 and 58; and (5) Petitioner's avowed purpose of making such an argument is to circumvent the denial of their Federal Rule of Appellate Procedure 4(a)(5) Motion to Extend the Time to Appeal.

RULE 29.1 STATEMENT

The subsidiaries (other than wholly-owned subsidiaries) of Respondent First Fidelity Bank, N.A. (successor by consolidation to First Fidelity Bank, N.A., New Jersey) are as follows:

(1) Allentown Development Company, Inc.;

(2) Global Processing Alliance, Inc.;

(3) Fawn Run;

(4) 500 International Drive;

(5) Internet, Inc.;

(6) T. Towers A.C., Inc.

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Federal Rule of Civil Procedure 60 ..... *passim*

MISCELLANEOUS

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No. 94-1529

In The

Supreme Court of the United States

October Term, 1994

MATTHEW C. HUDSON,

Petitioner,

v.

FIRST FIDELITY BANK, N.A., NEW JERSEY
(formerly known as First National State Bank),

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT FIRST FIDELITY BANK'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, First Fidelity Bank, N.A., New Jersey ("Respondent" or "FFB"), respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner, Matthew C. Hudson ("Petitioner" or "Hudson"), because: (1) the Petition fails to satisfy the prerequisite standards of Rule 10 of the United States Supreme Court; (2) the Third Circuit considered and properly rejected Petitioner's argument that the form and entry of the Final Judgment entered in favor of FFB, and against Petitioner, was purportedly in violation of Fed. R. Civ. P. 54 and 58;

(3) following the grant of Summary Judgment in favor of Respondent, Petitioner's counsel consented to the form and entry of the Final Judgment that they presently challenge; (4) the Final Judgment otherwise complies in all respects with Fed. R. Civ. P. 54 and 58; and (5) Petitioner's avowed purpose of making such an argument is to circumvent the denial of their Federal Rule of Appellate Procedure 4(a)(5) Motion to Extend the Time to Appeal.

COUNTERSTATEMENT OF THE CASE

Pursuant to Opinions and Orders filed by the United States District Court for the District of New Jersey (Gerry, C.J.), on October 3, 1990, January 29, 1991, and June 18, 1991, FFB's Motions for Summary Judgment were granted as to Petitioner's liability under a written guaranty. (Petitioner's Appendix ("P.App.") A-67).

On March 25, 1992, FFB's counsel and Petitioner's Chicago counsel agreed to the form and entry of a Stipulation and Order entitling Petitioner to a sum certain credit in order to facilitate the entry of a Final Judgment. (P.App. A-68). On May 8, 1992, after several additional discussions between FFB's counsel and Petitioner's Chicago counsel, Petitioner agreed to the form and entry of the Final Judgment that was entered by the District Court. Petitioner now asserts that the Final Judgment was void for purportedly failing to comply with Fed. R. Civ. P. 54 and 58.

On May 13, 1992, FFB's counsel forwarded an original and one copy of the Stipulation, and the Final Judgment, to Petitioner's Chicago counsel. (Respondent's

Appendix "R.App." 3a-4a). Indeed, Petitioner's Chicago counsel concedes that:

> [O]n May 14, 1992, I received a form of Final Judgment . . . . On May 21, 1992, I received a copy of [FFB's counsel's] letter with enclosures transmitting the proposed judgment . . . to the Court's clerk with a request that they be given to Judge Gerry for his review and execution.[1]

On May 18, 1992, counsel for FFB did indeed mail the proposed Final Judgment to the Court for execution and entry. (R.App. 4a). A copy of the transmittal letter to the Court was mailed to both Petitioner's Chicago and New Jersey counsel. (R.App. 4a).

On May 19, 1992, the District Court (Gerry, C.J.) executed the Final Judgment. On May 20, 1992, Chief Judge Gerry filed the Final Judgment with the Clerk of Court. The Clerk of Court signed and entered the Final Judgment on May 22, 1992. (P.App. A-18-19).

On May 26, 1992, FFB's counsel received a copy of the Final Judgment as well as the Stipulation and Order

---

[1] Although Petitioner has included in its Appendix the Certification of FFB's trial counsel submitted in opposition to Petitioner's alternative motions before the District Court, and to the Third Circuit, Petitioner has omitted a significant sentence that was included at paragraph 4 of the Certification which reads: "On May 8, 1992, after additional discussions, I forwarded a revised copy of the Final Judgment to Ms. Fair [i.e., Petitioner's Chicago counsel]." The significance of this omitted sentence is that it evidences Petitioner's Chicago counsel's involvement in actually drafting the proposed Final Judgment that was submitted to Chief Judge Gerry for consideration and entry. Respondent, FFB, therefore, has included the true and correct copy of the Certification in its Appendix. (R.App. 1a-4a).

from the Clerk of the Court. (P.App. A-69-70). On May 27, 1992, FFB's counsel sent a transmittal letter enclosing the Final Judgment to Petitioner's Chicago counsel and local New Jersey counsel. (P.App. A-70).

The time within which to file a Notice of Appeal expired on June 22, 1992. Petitioner, however, did not file a Notice of Appeal. On June 26, 1992, Petitioner's Chicago counsel telephoned FFB's counsel to determine whether the Final Judgment had been entered. (P.App. A-70). Petitioner's Chicago counsel were advised that the Court had entered the Final Judgment and that copies of the Final Judgment were sent to them and local New Jersey counsel under transmittal letter dated May 27, 1992. (P.App. A-71).

Petitioner's Chicago counsel, however, initially took the position that they had never received a copy of either the May 27, 1992 transmittal letter or the Final Judgment. (P.App. A-63-64). On June 29, 1992, after searching their offices, Petitioner's Chicago counsel confirmed receiving the May 27, 1992 transmittal letter indicating that Final Judgment had been entered on June 1, 1992, twenty-one (21) days before the time to appeal had expired. (P.App. A-64). Petitioner's Chicago counsel, however, then maintained that since they could not also locate the Final Judgment that was enclosed by FFB's counsel, they must have never received it with the transmittal letter. (P.App. 63-64).

On June 29, 1992, Petitioner's Chicago counsel telephoned Petitioner's New Jersey counsel to determine whether they had received the May 27, 1992 transmittal letter and Final Judgment from FFB's counsel. (R.App.

9a). Petitioner's New Jersey counsel advised Chicago counsel that "he did not recall having received it but would have to check the file." (R.App. 9a). New Jersey counsel "called back within a few moments to say he had received [the] letter with its enclosures [i.e. the Final Judgment]." (R.App. 9a). New Jersey counsel received the transmittal letter and Final Judgment on May 28, 1992, twenty-five (25) days before the time to appeal had expired. (P.App. A-73).

On July 14, 1992, Petitioner filed a Fed. R. App. P. 4(a)(5) Motion to Enlarge the Time to File a Notice of Appeal ("Rule 4(a)(5) Motion") urging that the failure to timely file a Notice of Appeal was the result of "excusable neglect." Petitioner alternatively made a Fed. R. Civ. P. 60(b)(4) Motion to Vacate Final Judgment ("Rule 60(b)(4) Motion") on the grounds that the Final Judgment allegedly did not comply with Rules 54 and 58 of the Federal Rules of Civil Procedure. Petitioner asserted that the May 22, 1992, Final Judgment was void, and must be reentered thereby causing the appeal period to run anew. (P.App. A-20-38).

The District Court denied Petitioner's alternative Motions by Opinion and Order dated October 21, 1992. Chief Judge Gerry, after analyzing the factors set forth in *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987), *cert. denied* 484 U.S. 1032 (1988), found that the conduct in failing to timely file a Notice of Appeal did not rise to the level of excusable neglect. (AP0098-0102). (P.App. A-25-33).

Judge Gerry also correctly held that Petitioner's Rule 60(b)(4) Motion was without merit because the Final

Judgment neither violated the word or spirit of Rules 54 and 58 of the Federal Rules of Civil Procedure. (P.App. A-33-37).

On November 24, 1993, Petitioner filed a Local Rule 12I Motion for Reconsideration of the denial of his Rule 4(a)(5) Motion. In his Motion for Reconsideration, Petitioner argued that the District Court overlooked certain facts in finding that New Jersey counsel's omissions did not rise to the level of excusable neglect. Petitioner also argued that the District Court overlooked certain legal authority which he claimed urged a finding of "excusable neglect" by Chicago counsel. (P.App. A-39-48). Petitioner did not seek reconsideration of the denial of his Rule 60(b)(4) Motion. On March 17, 1993, the District Court denied Petitioner's Motion for Reconsideration. (P.App. A-39-48).

Petitioner filed a Notice of Appeal on April 1, 1993 seeking to challenge the denial of both his Rule 60(b)(4) and Rule 4(a)(5) Motions. (P.App. A-78-79).

On October 26, 1993, oral argument was entertained by the Third Circuit (Becker, Roth and Lewis, *Circuit Judges*). By Memorandum Opinion of the Third Circuit (Lewis, *Circuit Judge*), dated October 27, 1994, the Third Circuit affirmed the District Court's denial of Petitioner's Rule 60(b)(4) Motion to Vacate and Rule 4(a)(5) Motion to Extend the Time to Appeal. (P.App. A-1-17).

With regard to Petitioner's Rule 60(b)(4) Motion to Vacate on the grounds that the Final Judgment did not comply with certain technical requirements of Rules 54 and 58 of the Federal Rules of Civil Procedure, the United States Court of Appeals for the Third Circuit affirmed the

District Court's denial of the motion having held that "[b]ecause we find no merit with respect to Hudson's contentions in this regard, we conclude that the district court did not abuse its discretion . . . . " (P.App. A-8). Petitioner's Motion for Rehearing was also denied by the Third Circuit.

REASONS FOR DENYING WRIT

Respondent respectfully submits that the Court should deny the Petition for Writ of Certiorari. In the first instance, no provision of Rule 10 of the United States Supreme Court is implicated by the Petition, and it is therefore procedurally deficient. The Third Circuit's decision in this matter is not in conflict with the decision of another United States court of appeals, no federal questions are involved, and there has been no departure by the Third Circuit or United States District Court for the District of New Jersey from any accepted and usual judicial proceeding.

Substantively, Petitioner was not denied a plenary review by the Third Circuit regarding whether the Final Judgment entered against him complied with the word and spirit of Rules 54 and 58 of the Federal Rules of Civil Procedure. The Third Circuit considered the legal arguments raised by Petitioner and found that the arguments were without merit. Therefore, the Third Circuit held that the denial of Petitioner's Rule 60(b)(4) Motion to Vacate was not an abuse of discretion.

In any event, the Final Judgment complies in all respects with the word and spirit of Rules 54 and 58. It

does not contain a "recital of the pleadings" as Petitioner suggests. The Final Judgment is also clearly marked "Final Judgment" and complies with the "separate document" requirement of Rule 58 of the Federal Rules of Civil Procedure. Moreover, Petitioner's counsel makes no argument that they were confused as to whether the "Final Judgment" was indeed a Final Judgment as opposed to an Order granting summary judgment thereby causing them to fail to timely file a Notice of Appeal. To the contrary, Petitioner's counsel concedes that they actually participated in the drafting of the Final Judgment that they now challenge, and they consented to its form and entry.

Petitioner's argument that the Final Judgment should have been prepared by the Clerk of Court under Rule 58, and not by and between counsel, is without moment and otherwise ignores Local Rule 22 of the United States District Court for the District of New Jersey. Whether the Clerk prepared the Final Judgment has nothing to do with why Petitioner's counsel failed to timely file a Notice of Appeal from the Final Judgment. Local Rule 22 requires counsel to submit a proposed form of Final Judgment to the court for consideration and entry. Additionally, the Clerk of the Court did, in fact, sign and enter the Final Judgment after it was signed by Chief Judge Gerry.

The Petition for Writ must also be denied because Petitioner's attempt to use Rule 60(b) of the Federal Rules of Civil Procedure to vacate the Final Judgment is aimed at circumventing the stringent "excusable neglect" standard of Rule 4(a)(5) of the Rules of Appellate Procedure (under which he was unsuccessful), for the sole purpose

of attempting to cause the time to appeal to run anew. In *Hall v. Community Mental Health Center*, 772 F.2d 42, 43 (3d Cir. 1985), the Third Circuit rejected such a "maneuver" as inappropriate because it "could have the effect of nullifying Rule 4(a)(5) altogether." (*citing West v. Keve*, 721 F.2d 91 (3d Cir. 1983)).

ARGUMENT

1. Petitioner Was Provided With A Plenary Appellate Review On The Issue Of Whether The Form And Entry Of The Final Judgment Against Him Complied With The Word And Spirit Of Rules 54 And 58 Of The Federal Rules of Civil Procedure, And The Third Circuit's Affirmance Of The District Court Does Not Conflict With The Decision Of Any Other Court Of Appeals

Petitioner erroneously argues that the Third Circuit did not provide him with plenary review on the issue of whether the Final Judgment entered against him was "void" for purportedly failing to comply with Rules 54 and 58 of the Federal Rules of Civil Procedure. Petitioner first argues that the issue of whether a Final Judgment is "void" under Rule 60(b) is subject to plenary review and not reviewable for an abuse of discretion. (Petitioner's Brief at 15-18) (*citing Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982)). Petitioner then argues that the Third Circuit affirmed the District Court's denial of his Rule 60(b) Motion to Vacate the Final Judgment under an erroneous "abuse of discretion" standard. (Petitioner's Brief at 15-18).

As properly noted by the Third Circuit, the denial of a Rule 60(b) Motion is, in fact, reviewed for an "abuse of discretion." *Harris v. Martin*, 834 F.2d 361, 364 (3d Cir. 1987). In the *Honneus* decision cited by the Petitioner, the appellant appealed the denial of his Rule 60(b) Motion to Vacate on the grounds that the district court lacked subject matter jurisdiction. The First Circuit recognized that: "An order ruling on F.R.Civ.P. 60(b) . . . is ordinarily reviewable only for an abuse of discretion." 691 F.2d at 2. Although the First Circuit did recognize that the scope of review regarding whether a final judgment may be "erroneous" in some respect is plenary, it acknowledged that the trial judge nonetheless has discretion to determine whether the purported error renders the Final Judgment "void":

> However, the concept of void judgments is narrowly construed. . . . It was settled by the Supreme Court at a very early day, that, although the judgments and decrees of the Circuit Courts might be erroneous, if [for instance] the records failed to show facts on which the jurisdiction of the court rested . . . , they were not nullities.

Id.

While the "scope of review" of a district court's interpretation and application of certain Rules, such as Rules 54 and 58, may be plenary, the propriety of the grant or denial of relief is still limited to an abuse of discretion "standard of review." For example, the Third Circuit's review of whether the district court below

applied the correct legal standard in considering Petitioner's Rule 4(a)(5) Motion was plenary. Having concluded that Chief Judge Gerry applied the correct legal standard, Chief Judge Gerry's application of the standard, however, was reviewable only under an "abuse of discretion" standard. *See, e.g., Consolidated Freightways Corp. v. Larson*, 827 F.2d 916, 919 (3d Cir. 1987), *cert. den. sub. nom.*, 484 U.S. 1032 (1988).

In the instant case it is clear that the Third Circuit provided Petitioner with a plenary review of the issue of whether the Final Judgment was void, summarily rejected such an argument as being without merit, and then affirmed the District Court's decision under an abuse of discretion standard. In rejecting Petitioner's argument that the Final Judgment did not comply with Rules 54 and 58, the Third Circuit specifically held:

> *Because we find no merit with respect to Hudson's contentions in this regard,* we conclude that the district court did not abuse its discretion . . . .

(emphasis supplied). (Petitioner's Brief at 17).

In sum, then, contrary to Petitioner's assertion, there is no conflict between the Third Circuit's decision in this matter, and the First Circuit's decision in *Honneus* and, therefore, no basis upon which to bring this Petition under Rule 10 of the United States Supreme Court.

2. Petitioner's Counsel Consented To The Form And Entry Of The Final Judgment That They Presently Challenge Which Otherwise Complies In All Respects With Fed. R. Civ. P. 54 and 58

Petitioner's challenge to the form and entry of the Final Judgment is capricious and ridicules the purpose of Rules 54 and 58 of the Federal Rules of Civil Procedure. The general purpose of Rule 54 and 58 is to ensure that Final Judgments are not confused, for instance, with general verdicts and Orders granting summary judgment so that the parties know when the time to appeal begins to run and ends. Petitioner's counsel not only participated in drafting the Final Judgment, but consented to its form and entry. The document is specifically marked "Final Judgment", is signed by Chief Judge Gerry and the Clerk of Court, consists of two short paragraphs, and even includes the post-judgment interest rate.

Petitioner's counsel makes no assertion that they confused the Final Judgment with a mere Opinion or Order granting Summary Judgment, and therefore failed to file a timely appeal. To the contrary, Petitioner's New Jersey counsel admits to having received the Final Judgment, but never tracking the time to appeal. Petitioner's Chicago counsel admits to having received the transmittal letter enclosing the Final Judgment (which they misplaced for over a month), and apparently lost the Final Judgment that was enclosed. Both counsel have acknowledged that they were well aware that the entry of the Final Judgment was what would start Petitioner's time for filing an appeal.

Given these events, and in an attempt to renew the appeal period, Petitioner argues that the Final Judgment is void because: (1) it allegedly contains a "recital of the pleadings" purportedly in contravention of Rule 54; (2) counsel to the parties, as opposed to the Clerk, prepared the Final Judgment purportedly in contravention of Rule 58 (although same is expressly provided for by Rule 58 and Local Rule 22 of the United States District Court for the District of New Jersey); (3) the Clerk did not sign the Final Judgment before entering it also allegedly in contravention of Rule 58 (which is a blatant misrepresentation because as noted by the District Court, the Final Judgment was signed by both Chief Judge Gerry and the Clerk), (P.App. A-37); and (4) the Clerk allegedly did not prepare a Minute Order indicating that the Final Judgment has been signed even though the Minute Order is included in the Appendix of Petitioner, and indicates that Chief Judge Gerry and the Deputy Clerk signed the Final Judgment.[2]

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[2] This is the third time that the Petitioner has attempted to claim that the Final Judgment was not signed by the Clerk even though the Final Judgment is clearly marked: "ENTERED ON THE DOCKET on May 22, 1992 WILLIAM T. WALSH, CLERK By /s/ JTO, DEPUTY CLERK. In Petitioner's printed reproduction of the Final Judgment included in his Appendix at A-18 and A-19, he includes a reproduction which would lead this Court to believe that neither Chief Judge Gerry nor the Clerk had ever signed the Final Judgment. A reproduction of the Clerk's stamp and signature does not even appear on Petitioner's reproduction. A true reproduction of the Final Judgment is included in Respondent's Appendix. (R.App. 5a-6a).

(a) Petitioner's "Recital of Pleadings" Argument

Rule 54(a) of the Federal Rules of Civil Procedure provides that: "A judgment shall not contain a recital of the pleadings, the report of a master, or the record of prior proceedings . . . . " *See* Fed. R. Civ. P. 54(a). Petitioner contends that the Final Judgment violates this provision of Rule 54(a) and, therefore, is void because it contains the following language:

> Plaintiff, First Fidelity Bank, N.A., New Jersey, having filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having filed opinions dated October 3, 1990, February 1, 1991, and June 18, 1991, ...

(P.App. A-18, 34).

In affirming Chief Judge Gerry of the District Court, the Third Circuit recognized the correctness of the District Court's holding that: "[In the first instance] . . . it is not at all clear that the short 'recital' contained in this judgment is violative of the rule." *Id.* (*citing* 10 C. Wright, A. Miller & A. Kane, *Federal Practice and Procedure*, § 2652 at p. 18). Wright & Miller cite to Official Forms 31 and 32 which compare favorably with the language of the Final Judgment entered by the District Court. *Id.* Official Form 31, for instance, provides: "This action came on for trial before the Court and jury, . . . and the issues having been duly tried and the jury having returned its verdict . . . . " *Id.*

The decisional law interpreting Rule 54(a) has uniformly held that the type of language that is prohibited by the Rule is language which could lead to confusion

about whether a Final Judgment is indeed a Final Judgment and therefore appealable, or simply a judicial opinion or non-dispositive document which a litigant would expect to be followed by a separate Final Judgment from which the time to appeal would run. These concerns, and the decisional law expressing same, however, are inapposite to the case at bar. For example, in *Soderstrom v. Kunsholm Baking Co.*, 184 F.2d 756, 758 (7th Cir. 1950), the district court's adoption of a lengthy master's report including extensive exhibits with no dispositive orders of any kind was held not to be a Final Judgment under Rule 54, and an appeal therefrom was dismissed. Similarly, in the more recent decision of *Theriot v. ASW Well Serv., Inc.*, 951 F.2d 84 (5th Cir. 1992), a district court's decision granting summary judgment was deemed not to be a Final Judgment in accordance with Rule 54, and Rule 58's "separate document" requirement, thereby resulting in the dismissal of the appeal.

Assuming, *arguendo*, that the Final Judgment's alleged "recital of the pleadings" in this case could somehow be deemed extraneous, the lower courts recognized that this provision of Rule 54 is not to be strictly applied: " '[a]lthough a judgment that contains extraneous matter is contrary to the spirit of Rule 54(a), if it is otherwise proper, is should be given effect.' " (P. App. A-34) (*citing* 10 C. Wright, A. Miller & A. Kane, *Federal Practice and Procedure*, § 2652 at p. 18).

Finally, when analyzing the purpose of Rule 54(a), it becomes abundantly clear that the Petition for Writ is without merit. The purpose of Rule 54's admonition against including extraneous language within a Final

Judgment is to ensure compliance with Rule 58's "separate document" requirement. As noted in the Comments to the 1963 Amendment to Rule 58:

> Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion for summary judgment is granted . . . . " [citation omitted]. Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment . . . . [I]t has become a matter of doubt whether the purported entry of judgment was effective, starting the time running . . . for the purpose of appeal.

See Federal Judicial Procedure and Rules (West 1993 Ed.) at 175 (*citing United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958); *Danzig v. Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3d Cir. 1960)).

In this case, there is no dispute that the Final Judgment at issue complies with the "separate document" requirement of Rule 58. The Final Judgment is two short paragraphs, and is a separate document from the Orders and decisions granting summary judgment. The Final Judgment is clearly marked "Final Judgment," and it was signed by both the Clerk and Chief Judge Gerry, and filed and entered by the Clerk. Moreover, the Petitioner does not make any argument that it was confused regarding whether the Final Judgment was indeed a Final Judgment from which the time to file a Notice of Appeal accrued. To the contrary, Petitioner participated in the drafting and consented to the form and entry of the Final Judgment. From Petitioner's perspective, the only real problem with

the Final Judgment is that Petitioner neglected to file a timely Notice of Appeal.

(b) Petitioner's Rule 58 Argument

Rule 58 of the Federal Rules of Civil Procedure provides in pertinent part that: "the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment . . . . " Petitioner argues that: "Here, the final judgment was not prepared by the clerk, nor was it signed by him. The executed Final Judgment was prepared by First Fidelity's attorney." (Petitioner's Brief at 14).[3]

Relying on *United States v. Indrelunas*, 411 U.S. 216 (1973), the Petitioner then argues that Rule 58 must be "mechanically applied," and since the Final Judgment was not prepared by the District Court Clerk, it is void. As properly noted, however, by the District Court, and affirmed by the Third Circuit:

> *Indrelunas* involved a violation of the separate document rule and held specifically that this aspect of Rule 58 – not the entire Rule – must be 'mechanically applied.' The Court based its reasoning on the purpose behind the separate document rule, which was to ensure greater

---

[3] As noted above, Petitioner's claim that the Clerk did not sign the Final Judgment is an unmistakable misrepresentation of fact. Indeed, as noted by the District Court: "Finally, defendant argues that the judgment was not signed by the clerk. In fact, the judgment has been stamped "Entered" and that stamp *has been signed by the clerk . . . .* " (emphasis supplied) (P.App. at A-37).

> certainty about when final judgment has been entered . . . . The purpose behind Rule 58's requirement that judgments be drafted by the court, in contrast, has nothing to do with ensuring certainty as to when judgment has been entered. Rather its purpose is to avoid delays in the entry of judgment. [citation omitted]. Thus, a violation of this aspect of Rule 58 does not implicate the adequacy of notice to the litigants, and we therefore do not find the *Indrelunas* holding appropriate or controlling here. Indeed, defendant has not cited any cases in which *Indrelunas* has been applied to this aspect of Rule 58.

(P.App. A-37).

The District Court also held, and the Third Circuit affirmed, that: "The preparation of final judgments by attorneys, is, in fact, expressly authorized under Local Rule 22B." Thus, by the adoption of Local Rule 22B, the United States District Court for the District of New Jersey has "otherwise ordered" attorneys to submit proposed forms of Final Judgment for consideration and entry. *See* Fed. R. Civ. P. 58. Petitioner's counsel actually participated in reviewing the Final Judgment on several occasions prior to submission to Chief Judge Gerry for consideration and entry. Petitioner's argument that the Final Judgment should be deemed void because it was not prepared by the Clerk is simply frivolous.

For these reasons, Petitioner's arguments that the Final Judgment violates Rules 54 and 58 of the Federal Rules of Civil Procedure should be rejected.

3. Petitioner's Purpose Of Challenging The Form And Entry Of The Final Judgment Is To Circumvent The Denial Of Their Rule of Appellate Procedure 4(a)(5) Motion To Extend The Time To Appeal

In *Hall v. Com. Mental Health Center*, 772 F.2d 42 (3d Cir. 1985), the Third Circuit held that a would-be appellant should not use a Rule 60(b) Motion to Vacate Final Judgment in an attempt to circumvent the strict constraints of a Fed. R. App. P. 4(a)(5) Motion.

Since Petitioner does not challenge the holdings of the District Court and Third Circuit denying his Rule 4(a)(5) Motion to Extend the Time to Appeal, the instant Petition for Writ of Certiorari is an attempt to accomplish the same type of procedural maneuvering criticized in *Hall*.

The Third Circuit's holding in *Hall* is particularly apposite in the instant matter:

> The rule in this circuit with respect to the use of Rule 60(b) to vacate and reenter final judgments is stated in *West v. Keve*, 721 F.2d 91 (3d Cir. 1983), which at the outset would seem to preclude the maneuver requested by Hall. In that case, the appellant had moved the district court under Rule 60(b) to reinstate the earlier judgment and essentially revive his time for appeal . . . , which had lapsed according to the limitations of Rule 4(a). We held that Rule 4(a), being more specific to the appellate process than Rule 60(b), should control the timing of the filing of appeals, especially in view of the fact that allowing the use of Rule 60(b) to circumvent the constraints of Rule 4(a) could have the effect of nullifying Rule 4(a)(5) altogether. . . . We held

> finally, *'that because the avowed purpose of the Rule 60(b) motion in this case was to extend the time for appeal, it had to meet the time limitations of Rule 4(a).'*

Id. at 44 (emphasis supplied).

Despite the admonition of *Hall*, Petitioner, of course, argues that the District Court's denial of his Rule 60(b) Motion, which was filed *after* the time to appeal had expired, was in error because the Final Judgment was not "technically" a Final Judgment as set forth above. His "avowed purpose" in filing the Rule 60(b) Motion was the same as the would-be appellant in *West*; that is, to have the Final Judgment vacated and reentered so that his time to appeal would run anew.

In accordance with the holdings in *Hall* and *West*, then, Petitioner's argument that the Final Judgment should be vacated and reentered is a procedural maneuver which must be rejected.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 12, 1995

No. 94-1529

In The

Supreme Court of the United States

October Term, 1994

MATTHEW C. HUDSON,

Petitioner,

v.

FIRST FIDELITY BANK, N.A., NEW JERSEY
(formerly known as First National State Bank),

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT FIRST FIDELITY BANK'S APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BY: DAVID B. BACON, ESQUIRE (DB 0028)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FIRST FIDELITY BANK, N.A. NEW JERSEY (formerly known as First National State Bank), Plaintiff, v. MATTHEW C. HUDSON, Defendant.	Civil Action No. 88-5550 (JFG) Date of Argument: September 4, 1992

CERTIFICATION OF PAUL KIZEL IN OPPOSITION TO DEFENDANT'S MOTION TO EXTEND TIME TO APPEAL

(Filed Aug. 7, 1992)

1. I am an attorney admitted to practice in the State of New Jersey. I am a member of the firm of Ravin, Sarasohn, Cook, Baumgarten, Fisch & Baime, former counsel for Plaintiff, First Fidelity Bank, N.A., New Jersey in this action. I have personal knowledge of the facts set forth herein.

2. Pursuant to Opinions and Orders filed by this Court on October 3, 1990, January 29, 1991, and June 18, 1991,

Plaintiff's Motion for Summary Judgment was granted as to Defendant's liability under a written guaranty executed by Defendant in favor of Plaintiff. See Exhibits A, B and C.

3. The only outstanding issue remaining after the June 18, 1991 Opinion and Order was whether Defendant was entitled to a credit equal to the value of certain real estate which served as collateral for the debt obligation guaranteed by the Defendant and, if so, the amount of the credit. *See* Order attached as part of Exhibit C. The June 18, 1991 Order scheduled a hearing on July 3, 1991 to consider this issue. *Id.* However, prior to July 3, 1991, I had conversations with Lisa Fair, an attorney with the Law Office of Michael Rovell, the Chicago-based co-counsel for the Defendant (the "Rovell Firm"), concerning the possibility of avoiding the need for a hearing by having the parties mutually agree that Defendant was entitled to a credit and upon the amount of the credit. Prior to the July 3, 1991 hearing date either I and/or Lisa Fair contacted the Court and advised that the parties were attempting to resolve the remaining issue without the need for a hearing. As a result the hearing was adjourned without date.

4. By letter dated March 25, 1992, after several conversations with Ms. Fair concerning the amount of the credit, I forwarded a proposed Stipulation and a proposed Final Judgment to Lisa Fair, with a copy to Robert Nussbaum, an associate with Defendant's New Jersey counsel, Saiber, Schlesinger, Satz & Goldstein (the "Saiber Firm"). See Exhibit D. On April 1, 1992, after I discussed certain revisions with Ms. Fair, I forwarded revised forms of the documents to Ms. Fair. *Id.* On May 8, 1992, after additional discussions, I forwarded a revised copy of the Final Judgment to Ms. Fair. *Id.* On May 13, 1992, I forwarded an original and one copy of both the

final versions of the Stipulation and Final Judgment to Ms. Fair for execution. *Id.*

5. On May 18, 1992, I sent a letter to the Court enclosing an original and one copy of the Stipulation and Final Judgment. Copies of the letter and enclosures were simultaneously forwarded to Lisa Fair by fax and regular mail and to Robert Nussbaum by regular mail. *See* Exhibit E.

6. On or about Tuesday, May 26, 1992, I received executed and conformed copies of the Stipulation and Final Judgment from the Clerk of the District Court.

7. On May 27, 1992 I sent a letter via regular mail addressed to "Michael J. Rovell, Esq. 55 West Monroe Street, Suite 3300, Chicago, Illinois 60603, Attn: Lisa Fair, Esq." enclosing copies of the Stipulation and Final Judgment. A copy of the letter and enclosures were also forwarded to Robert Nussbaum by regular mail. See Exhibit F.

8. I did not receive any communication from Lisa Fair, Michael Rovell, Robert Nussbaum or any other person from the Rovell Firm or Saiber Firm until the late afternoon of Friday, June 26, 1992 when I received a call from Lisa Fair who informed me that Michael Rovell was also on the line. They both asked whether I knew about the status of the entry of the Final Judgment. I told them that I received copies of the Stipulation and Final Judgment several weeks earlier from the Clerk and sent those documents to both Ms. Fair and Mr. Nussbaum. At their request, on June 26, 1992, I instructed my secretary to again send a copy of the May 27, 1992 letter and Final Judgment to Mr. Rovell's office.

I hereby certify that the foregoing statements are true. I am aware that if any of the statements are willfully false I am subject to punishment.

/s/ Paul Kizel
PAUL KIZEL

DATED: August 5, 1992

By: /s/ Paul Kizel
Paul Kizel
(PK 4176)
RAVIN, SARASOHN, COOK,
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN, NEW JERSEY

FIRST FIDELITY BANK, N.A. NEW JERSEY (formerly known as First National State Bank), Plaintiff, v. MATTHEW C. HUDSON, Defendant.	Civil Action No. 88-5550 CIVIL ACTION

FINAL JUDGMENT

FILED
MAY 20 1992
At 8:30 M
WILLIAM T. WALSH
CLERK

ENTERED
on
THE DOCKET
on May 22, 1992
WILLIAM T. WALSH, CLERK
By /s/ JTO
(Deputy Clerk)

Plaintiff, First Fidelity Bank, N.A., New Jersey, having filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the court having filed opinions dated October 3, 1990, February 1, 1991, and June 18, 1991, and the parties having entered into a stipulation dated May ___, 1992;

IT IS ON THIS 17th day of May, 1992;

ORDERED AND ADJUDGED, that the Plaintiff, First Fidelity Bank, N.A., New Jersey, be granted summary judgment against Defendant, Matthew C. Hudson, in the sum of $13,763,795.05 with interest thereon from this date at the rate of 4.40% as provided by law.

/s/ John F. Gerry
HONORABLE JOHN F. GERRY
CHIEF JUDGE, UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY